(25,420)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 590.

WILLIAM E. PECK AND COMPANY, INCORPORATED, PLAINTIFF IN ERROR,

vs.

JOHN Z. LOWE, JR., COLLECTOR OF INTERNAL REVENUE, SECOND DISTRICT OF NEW YORK.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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Byron S. Adams & Detweiler (Inc.), Printers, Washington, D. C., July 28, 1916.

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1

United States District Court,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

WILLIAM E. PECK & CO., INCORPORATED,

against

JOHN Z. LOWE, JR., Collector of Internal Revenue, Second District of New York.

2

To the above named Defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer, on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

WITNESS the Hon. Charles M. Hough, Judge of the District Court of the United States for the Southern 3
[SEAL] District of New York, at the City of New York, this 22nd day of October in the year one thousand nine hundred and fifteen.

ALEX. GILCHRIST, JR.

RALPH T. KEYSER,
Plaintiff's Attorney,
Office and Post Office Address
15 William Street,
Borough of Manhattan,
New York City.

4 **Complaint.**

IN THE UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

WILLIAM E. PECK & Co., INCORPORATED,
Plaintiff,

against

JOHN Z. LOWE, JR., Collector of Internal Revenue, Second District of New York,
5 Defendant.

The plaintiff appearing by Ralph T. Keyser, its attorney, for its complaint against the defendant, respectfully shows to this Court and alleges as follows:

First.—That the plaintiff, is, and at all the times hereinafter mentioned was, a corporation duly organized and existing under the laws of the State of West Virginia, and was and still is a citizen of the United States, having a principal office and
6 place of abode in the Borough of Manhattan, City of New York, within the territorial boundaries of the Second Internal Revenue District of New York.

Second.—That upon information and belief the defendant, John Z. Lowe, Jr., from and including the first day of April, 1915, has been and is the Collector of Internal Revenue for the Second District of New York, and was and is now an inhabitant and resident of the Southern District of New York.

Third.—That on or about May 25th, 1915, said John Z. Lowe, Jr., acting as such Collector of Internal Revenue for the Second District of New York, and claiming to act under and in pursuance of the provisions of Section 2 of the Act of Congress entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, demanded of the plaintiff the sum of Four hundred twenty-six and 10/100 Dollars ($426.10) which said Collector claimed to be then due and payable from plaintiff as and for the income tax due for the calendar year January 1, 1914, to December 31, 1914, and claimed that the said sum was due and payable from the plaintiff on or before the 30th day of June, 1915, and threatened to enforce the payment of the same together with the penalties and interest provided by said Act of Congress.

Fourth.—That thereupon the plaintiff did on or about the 30th day of June, 1915, solely in order to prevent distraint and sale of its property and upon compulsion and under duress and coercion involuntarily pay to the defendant as such Collector of Internal Revenue for the Second District of New York, the said sum of Four hundred twenty-six and 10/100 Dollars ($426.10), and the plaintiff at the time of payment protested to defendant in writing that no tax was due from the plaintiff and that the defendant was without authority to exact or collect the same or any part thereof, and it is stated by the defendant in the written statement issued by him acknowledging the receipt of said tax of Four hundred twenty-six and 10/100 Dollars ($426.10) that this tax was "Paid under protest" by the plaintiff.

10 Complaint.

Fifth.—That upon information and belief there was not on the 30th day of June, 1915, nor at any other time either before said date or since, any sum due from the plaintiff for, or on account of, any tax imposed by said Section 2 of said Act of Congress, and the defendant as such Collector of Internal Revenue or otherwise was without authority to exact or collect the said sum of Four hundred twenty-six and 10/100 Dollars ($426.10) or any part thereof.

Sixth.—That thereafter on or about the 8th day
11 of July, 1915, the plaintiff, in accordance with the provisions of law and the regulation of the Treasury Department in such cases made and provided, made an application in writing to the Commissioner of Internal Revenue and duly demanded the refund and repayment to it of the said sum of Four hundred twenty-six and 10/100 Dollars ($426.10) on the ground that Section 2 of the Act of October 3rd, 1913, providing for a tax on incomes of individuals, corporations, joint stock companies, associations and insurance companies is, in so far as this tax is assessed and levied upon incomes derived from exports, in violation of Section 9, Article I, of the Constitution of the United
12 States, which provides that "No tax or duty shall be laid on articles exported from any State."

Seventh.—That said tax of Four hundred twenty-six and 10/100 Dollars ($426.10) was assessed and collected from income of the plaintiff earned in and obtained by and through exporting merchandise from the United States to foreign countries and said tax of four hundred twenty-six and 10/100 Dollars ($426.10) was a tax on the proceeds of exportations and as such was in substance and effect a tax on exports and in violation

of the Constitution of the United States and illegal, null and void and of no force and effect; and that the aforesaid Act of Congress in so far as it imposes a tax on incomes derived from exports is in violation of that provision of Article I, Section 9, Clause 5, of the Constitution of the United States which provides that "No tax or duty shall be laid on articles exported from any State."

Eighth.—That said Commissioner of Internal Revenue on or about July 27th, 1915, denied and rejected the aforesaid application of the plaintiff to remit or refund the amount of Four hundred twenty-six and 10/100 Dollars ($426.10) collected from the plaintiff, or any part thereof, stating that "Section G of the Act mentioned provides that the normal tax imposed upon individuals shall likewise be assessed and paid annually upon the net income arising or accruing *from all sources* during the preceding calendar year," and no part thereof has been remitted, refunded or repaid to this plaintiff or to any one for his account.

Ninth.—That said rejection by the Commissioner of Internal Revenue of the application of the plaintiff for said refund of said tax, with the reason therefor as aforesaid, is insufficient, void and of no effect, inasmuch as the construction and application by said Commissioner of Internal Revenue of said Section 2 of the Act of Congress of October 3rd, 1913, is in violation of the provision of Article I, Section 9, Clause 5, of the Constitution of the United States, above quoted.

WHEREFORE, the plaintiff demands judgment against the defendant for the sum of Four hundred twenty-six and 10/100 Dollars ($426.10) with

interest from the 30th day of June, 1915, besides the costs of this action.

RALPH T. KEYSER,
Attorney for Plaintiff,
Office and Post Office address,
No. 15 William Street,
New York City.

JOHN C. SPOONER,
Of Counsel.

STATE OF NEW YORK, }
County of New York, } ss.:

H. R. HILLARD, being duly sworn, deposes and says, that he is treasurer of William E. Peck&Co., Incorporated, the plaintiff named in the above entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

That the sources of deponent's information and the ground of his belief as to those facts not stated upon his own knowledge are reports received by deponent and general acquaintance with the business of the plaintiff had by deponent as an officer thereof.

H. R. HILLARD.

Subscribed and sworn to before me
this 20th day of October, 1915.

[SEAL] M. K. STAPLETON, JR.,
Notary Public.

Notary Public,
N. Y. County No. 425, Reg. No. 7014.
Kings County No. 7004, Reg. No. 5.
Queens County No. 790.
Certificates filed in Nassau & Richmond Counties.

Answer. 19

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK,

WILLIAM E. PECK & CO., INCORPORATED,
Plaintiff,

against

JOHN Z. LOWE, JR., Collector of Internal Revenue, Second District of New York,
Defendant. 20

The defendant above named, by his attorney H. Snowden Marshall, United States Attorney for the Southern District of New York, for his answer to the complaint of the plaintiff herein;

First.—Has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in those paragraphs of the complaint marked and numbered "FIRST" and "SEVENTH."

21

Second.—Admits that on or about May 25, 1915, the defendant acting as Collector of Internal Revenue for the Second District of New York, and in pursuance of the provisions of the second section of the Act approved October 3, 1913, demanded of the plaintiff the sum of four hundred and twenty-six dollars and ten cents ($426.10), then due and payable from the plaintiff as and for an income tax for the calendar year January 1—December

1, 1914, and claimed that the said sum was due on or before June 30, 1915, and denies each and every other allegation contained in that paragraph of the complaint marked and numbered "THIRD."

Third.—Admits that the plaintiff on or about the 30th day of June, 1915, paid to the defendant as such Collector of Internal Revenue the sum of four hundred and twenty-six dollars and ten cents ($426.10) and accompanied said payment with a statement in writing, and that a receipt was given by the defendant for said payment upon which was stamped the words "paid under protest" and denies each and every other allegation contained in that paragraph of the complaint marked and numbered "FOURTH."

Fourth.—Denies the allegations contained in those paragraphs of the complaint marked and numbered "FIFTH" and "NINTH."

WHEREFORE, the defendant demands judgment against the plaintiff dismissing the complaint herein, together with the costs and disbursements of this action.

H. SNOWDEN MARSHALL,
United States Attorney for the
Southern District of New York,
Attorney for the Defendant.
Office and Post Office Address,
U. S. Court House and Post Office
Building, Borough of Manhattan,
New York City.

Answer.

State of New York,
County of New York,
Southern District of New York. } ss.:

John Z. Lowe, Junior, being duly sworn, deposes and says that he is the defendant in the above named action and has read the foregoing answer and knows the contents thereof and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

(Sgd.) John Z. Lowe, Jr.

Sworn to before me this 20th
day of November, 1915.

(Sgd.) G. Hancke,
[seal] Notary Public,
Bronx County #44.
Reg. N. Y. County #156.

28 **Opinion of District Judge.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT, NEW YORK.

WM. E. PECK & CO., INCORPORATED,

vs.

JOHN Z. LOWE, JR., Collector.

L. 14—299

29 Action at law. Both parties moving for a directed verdict.

JOHN C. SPOONER and CHARLES P. SPOONER for Plaintiff.

EARL B. BARNES, Assistant U. S. Attorney, for Defendant.

HOUGH, *D. J.*,

Plaintiff is engaged in buying goods in the Uinted States, and selling them largely to foreigners, making deliveries abroad.

Having been taxed upon its corporate income from all sources, it sues to recover that proportion
30 of the tax compulsorily paid which its foreign business bears to its whole trade, upon the ground that a tax on income derived from the profitable sale of exported articles is a tax on the articles so exported and, therefore, unconstitutional.

It will be assumed (but not held) that the Sixteenth Amendment does not affect the matter, which is therefore to be decided in the light of a long line of cases, of which Thames & Mersey &c., Co. vs. United States (237 U. S. 19) is the latest.

31

No elaborate review of decisions will be attempted. Such temptations in constitutional matters are to be resisted by trial courts, whose decisions thereon may interest the writer but have no other importance.

Constitutional inquiries are political rather than legal. The fundamental law is not to be interpreted like a statute. The only decision worth having is that of the tribunal whose singular duty it is under legal forms either to finally withdraw some matter from political action or precipitate constitutional amendment, according to the acceptance or popularity of the judgment, not among 32
Bar and Bench, but with the men in the street.

The only justifiable exception to this rule of reticence arises when is presented a glaring instance of invaded private right demanding action to redress patent wrong. This is not such a case.

A recent commentator on the decisions most relied upon by plaintiff (Fairbanks vs. United States, 181 U. S., 283; United States vs. Hvoslef, 237 U. S., 1, and Thames & Mersey, &c., Co. vs. United States, *supra*), thus summarizes them: "any governmental burden which affects in any way the *processes* of *exportation* is unconstitutional and void."

33

This expresses my view of their result, and it is as far as the Supreme Court has definitely gone in identifying the substance exported with its accidents, attributes and adjuncts. How far the process will go can not be foreseen. I shall go further only under compulsion.

At present it is held by still ruling cases that taxation which "anticipates exportation" is not within the constitutional prohibition (*e. g.*, Cornell vs. Coyne, 192 U. S., 418). Obviously general

taxation on production may discourage exports, yet that gives no relief as to articles intended for foreign ports. By the same reasoning, profits on income from exports should be taxable, because subsequent to the act of export. Income or profit presupposes a successfully completed transport; it is no part of the act of exportation, though it may be said to be a result thereof. Similarily the fact that taxation of the fruits of exportation may discourage business quite as much as anticipatory taxation on the goods transported is immaterial.

Against all this are presented the numerous
35 opinions holding that a tax on a salary is a tax on the office producing it (Collector vs. Day, 11 Wall., 113); that a tax on the receipts from interstate commerce is a tax on the commerce itself (Phila., &c., Co. vs. Pennsylvania, 122 U. S., 326) and the like.

Such decisions usually describe themselves as busied in piercing through form to substance. They are even more logically viewed as seeking a definition of the subject of prohibition, and then laying down what in patent law is called its "range of equivalent."

Under the constitutional clause here to be con-
36 sidered we must find equivalents between the articles exported and the processes or incidents of the act of exportation or transport. But protection begins with that act and must end with its completion, because the *act* is the subject of the constitutional prohibition. After export profits come and taxation with them.

Verdict directed for defendant.

C. M. Hough,
U. S. D. J.

(Filed June 1st.)

Order directing Verdict for Defendant. 37

UNITED STATES DISTRICT COURT,

S. D. N. Y.

WM. E. PECK & Co., INC.,

v.

JOHN Z. LOWE, JR., Collector.

This action at law having come on to be tried 38
at this term, and both plaintiff and defendant having moved for a directed verdict, and the Court having considered thereof, it is

Ordered the motion of the defendant be and hereby is granted, and that the clerk enter a verdict herein for defendant, and that said defendant have judgment on said verdict.

Dated, May 31, 1916.

C. M. HOUGH,
D. J.

39

40 **Order denying Motion to set aside Verdict and for new trial.**

At a Trial Term of the United States District Court held in and for the Southern District of New York at the Court House in said District on the 6th day of June, 1916.

Present—Hon. C. M. Hough, District Judge.

William E. Peck & Co., Inc.,
Plaintiff,

against

41 John Z. Lowe, Jr., Collector of Internal Revenue, Second District of New York,
Defendant.

L. 14—299.

The issues in this action having duly come on for trial, and having been tried on the 24th day of May, 1916, before the Court and a jury, and the Court having directed the jury to enter a verdict herein for defendant over the objection & exception duly taken by plff, and the jury having rendered its verdict in favor of defendant and against plaintiff; and the judge presiding at the
42 trial aforesaid having after the rendition of said verdict duly entertained a motion on his minutes on behalf of plaintiff to set aside said verdict and for a new trial because the verdict is contrary to the evidence and contrary to law; and after hearing Charles P. Spooner, Esq., of counsel for plaintiff for the motion, and Earl B. Barnes, Esq., of counsel for defendant opposed; it is

Ordered that the plaintiff's said motion be and the same is hereby in all respects denied.

C. M. Hough,
District Judge.

43

Judgment for Defendant.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WILLIAM E. PECK & COMPANY, Incorporated,

vs.

JOHN Z. LOWE, JR., Collector of Internal Revenue, Second District of New York.

L. 14/299.

44

The issues in this action having been regularly brought on for trial before The Honorable Charles M. Hough, District Judge, and a Jury of one, at a Stated Term of this Court held on the 24th day of May, 1916, at the United States Courts and Post Office Building, in the Borough of Manhattan, City of New York, and the plaintiff herein appearing by Ralph T. Keyser, Esq., its attorney, and the defendant appearing by Earl B. Barnes, Assistant United States Attorney, and the allegations and proofs on behalf of the plaintiff having been heard 45 and considered, and at the close of the testimony for both sides, the attorneys for both parties having moved for the direction of a verdict, and thereafter on the 1st day of June, 1916, the Honorable Court having filed an opinion in favor of the defendant, and entered an order directing a verdict in favor of the defendant herein and ordering that the said defendant have judgment on said verdict, and a verdict having been entered accordingly

46 Judgment for Defendant.

Now, on motion of H. Snowden Marshall, United States Attorney for the Southern District of New York, attorney for defendant, it is

ORDERED AND ADJUDGED that the defendant herein, John Z. Lowe, Jr., Collector of Internal Revenue for the Second District of New York, recover of the plaintiff, William E. Peck & Company, Incorporated, the sum of Twenty-nine and 35/100 Dollars ($29.35), costs as taxed, and the defendant have execution therefor.

Judgment signed this 15th day of June, 1916.

47

ALEX. GILCHRIST,
Clerk.

48

49

Bill of Exceptions.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WILLIAM E. PECK & CO., INC., Plaintiff,

against

JOHN Z. LOWE, JR., Collector of Internal Revenue, Second District of New York, Defendant.

L. 14—299.

50

PLAINTIFF'S BILL OF EXCEPTIONS.

The above-entitled cause came on for trial before the above Court and a jury of one, the physical presence of the jury being dispensed with, on the 24th day of June, 1916.

Honorable C. M. Hough, District Judge, presiding. The plaintiff appeared by Ralph T. Keyser, Esq., attorney of record, and Charles P. Spooner and George H. Savage, of counsel; and 51
the defendant appeared by Honorable H. Snowden Marshall, United States Attorney, attorney of record, and Assistant United States Attorney, Earl B. Barnes, Esq., of counsel, and the following proceedings were had.

HARRY R. HILLARD called as a witness on behalf of the plaintiff was first duly sworn and testified as follows:

52 Plaintiff's Bill of Exceptions.

Direct-Examination by Mr. Savage:

Q. What is your business? A. Exporter.

Q. Are you connected with any company? A. Treasurer of William E. Peck & Company, Incorporated.

Q. That is the plaintiff here? A. Yes, sir.

Q. Is the plaintiff a corporation? A. Yes.

Q. What State? A. West Virginia.

Mr. Savage.—I have here the original certificate of incorporation of the plaintiff, and as it is an original record, I would not like
53 to have it introduced in evidence, but would prefer to have introduced a typewritten copy, to which I understand there is no objection.

Mr. Barnes.—No, sir.

The typewritten copy of the certificate of incorporation of plaintiff was received and marked in evidence Plaintiff's Exhibit I and reads as follows:

"Certificate of Incorporation.

State of West Virginia.

William E. Peck and Company.

54 I, Wm. A. Ohley, Secretary of State of the State of West Virginia, hereby certify that an Agreement, duly acknowledged and accompanied by the proper affidavits; has been this day delivered to me, which Agreement is in the words and figures following:

The undersigned agree to become a corporation by the name of William E. Peck & Company for the purpose of buying and selling goods, wares and merchandise in the United States and foreign countries either as principal or on commission or

consignment, publishing books or papers in connection therewith, which corporation shall keep its principal office or place of business at New York City in the County of New York and State of New York, and is to expire on the First day of November, 1942. And for the purpose of forming the said corporation, we have subscribed the sum of Five Hundred Dollars to the Capital thereof, and have paid in on said subscriptions the sum of Fifty Dollars, and desire the privilege of increasing the said Capital, by the sale of additional Shares from time to time, to Two Hundred Thousand Dollars in all. The Capital so subscribed is divided into 56
Shares of One Hundred Dollars each, which are held by the undersigned respectively, as follows, that is to say:

Names.	*Residence.*	*No. of Shares.*
By William E. Peck,	Montclair, New Jersey,	One
By Harry R. Hillard,	New York City, N. Y.,	One
By Noah C. Rogers,	New York City, N. Y.,	One
By George W. Wagner,	New York City, N. Y.,	One
By George W. McKenzie,	Brooklyn, N. Y.,	One

And the Capital to be hereafter sold is to be divided into Shares of the like amount. 57

Given under our hands, this Second day of November, 1892.

William E. Peck,	[seal]
Harry R. Hillard,	[seal]
Noah C. Rogers,	[seal]
George W. Wagner,	[seal]
George W. McKenzie,	[seal]

Wherefore, The corporations named in the said Agreement, and who have signed the same, and

58 Plaintiff's Bill of Exceptions.

their successors and assigns, are hereby declared to be from this date until the First day of November, nineteen hundred and forty-two, a Corporation by the name and for the purposes set forth in said Agreement.

Given under my hand and the Great Seal of the said State, at the City
[SEAL] of Charleston this Twenty-First day of November, eighteen hundred and ninety-two.

WM. A. OHLEY,
Secretary of State."

59

Q. Where does the plaintiff do business? A. In all foreign countries, principally South America and Australia.

Q. Has the plaintiff a place of business in this city? A. Yes, sir.

Q. Where? A. 104 Pearl street, New York.

Q. Borough of Manhattan, New York City? A. Yes, sir.

Mr. Savage.—It is conceded by the answer that the defendant John Z. Lowe, Jr., from and including the first day of April, 1913, has been and is the Collector of In-
60 ternal Revenue for the Second District of New York, and was and is now an inhabitant of the Southern District of New York.

Q. What were your duties as Treasurer of the plaintiff? A. To receive all the moneys that came in, and disburse them.

Q. Did you take charge of the books? A. I did have, I have in a way, ultimate charge of the books, general supervision of them.

Q. Have you charge of preparing income tax statements for the Government? A. I have.

61

Q. Of the income of the plaintiff? A. Yes.

Q. Have you charge of paying the taxes for the plaintiff? A. I have.

Q. Charge of paying the income tax to the Government for the plaintiff? A. I have.

Q. What was the business of the plaintiff in the year 1914? A. Exporting American goods to foreign countries.

Q. Did you at any time receive a notice of assessment of income tax for 1914? A. I did.

Q. On the plaintiff? A. Yes.

Q. I show you a paper, which purports to be the assessment. Can you identify that as the notice of assessment? A. Yes, sir.

62

Mr. Savage.—I would like to have this marked in evidence.

The same was received and marked in evidence Plaintiff's Exhibit 2 and reads as follows:

"Form 647.

UNITED STATES INTERNAL REVENUE.

CORPORATION

NOTICE OF ASSESSMENT OF SPECIAL EXCISE AND INCOME TAX.

40/3

63

UNITED STATES INTERNAL REVENUE,

Office of the Collector.

District of 2nd Dist. New York

Custom House Building.

List for month of April, 1915.
to Wm. E. Peck & Co.,
104 Pearl St.

MAY 25, 1915.

You are hereby notified that a { special excise tax / income tax

under the provisions of section { 38 of the Act of / 2 of the Act of August 5, 1909 / October 3, 1913 } amounting to $426.10, has been assessed against you by the Commissioner of Internal Revenue and transmitted by him to me for collection. This tax is due and payable on or before the June 30, 1915, to the person designated below in the manner set forth on the reverse side of this notice. Payment may be made to me

At U. S. Custom House Bldg.

Or to John Z. Lowe, Jr., Collector.

65 (All checks must be certified)"

(Endorsed on back):

"To avoid penalty and interest, taxes must be paid to the collector or person designated by him in such a manner as will enable him to place the same with his depositary and receive a certificate of deposit therefor not later than the close of business of the date mentioned in the body of this notice.

Payment may be made in currency, post office money order, or certified check on a national or state bank or trust company, providing such checks can be collected without cost to the Govern-

66 ment. It should be borne in mind by taxpayers that the date when such checks may be cashed and the money deposited is the date of payment and allowance should be made accordingly.

Collectors can not receive in payment of taxes uncertified checks, personal checks, drafts, or vouchers, and all indorsements by collectors on certified checks are made without recourse. Money orders and certified checks must be made payable to the Collector of Internal Revenue."

Q. Did you, pursuant to this notice of assess-

ment, Plaintiff's Exhibit 2, pay the assessed tax? A. I did.

Q. I show you what purports to be a check of William E. Peck & Company, #12951, for $426.10, and ask you if that is the check that you paid pursuant to that notice of assessment? A. It is.

Mr. Savage.—I offer the check in evidence.

The same was received and marked in evidence Plaintiff's Exhibit 3 and reads as follows:

"No. 12951 68

WILLIAM E. PECK & Co.

104 Pearl Street,

New York City.

Date, JUN 23, 1915.

Pay to the order of John Z. Lowe Jr., Collector $426-10/100 Four hundred and twenty-six 10/100 Dollars.

H. R. HILLARD,
Treas.

When properly endorsed this check is payable at

NEW YORK PRODUCE EXCHANGE BANK, 69
New York City.

CERTIFIED
Payable Through
NEW YORK CLEARING HOUSE
KIEFER
New York Produce Exchange
Bank
Jun 23, 1915."

(Endorsed on back):

"The endorsement of this check by the payee

guarantees acceptance of it in full settlement of the account as stated on voucher bearing corresponding number.

(Endorse here).

Pay to the order of the
HANOVER NATIONAL BANK
John Z. Lowe, Jr. Coll.

Received payment

Through the New York Clearing House

Jun 30, 1915

2 2

Mail Teller

THE HANOVER NATIONAL BANK,

New York.

Received payment."

Q. Did you, at the time that check was paid, protest the assessment of that tax? A. I did.

Mr. Savage.—I have asked the Government to produce the original protest made by the plaintiff, dated June 23, 1915, addressed to the Secretary of the Treasury, Commissioner of Internal Revenue, and Collector of Internal Revenue for the Second District of New York, and the Government states it is unable to find the original, and I am now producing a correct copy.

Q. I ask you, Mr. Hillard, if you can identify this copy as a copy of the original protest that was given at the time the check, Plaintiff's Exhibit 3, was paid? A. That is an exact copy.

Mr. Savage.—I offer that in evidence.

The same was received and marked in

evidence Plaintiff's Exhibit 4 and reads as follows: 73

"JUN 23rd, 1915.

Protest.

To the Secretary of the Treasury, the Commissioner of Internal Revenue, and the Collector of Internal Revenue for the Second District of New York.

Sirs:

The undersigned, in tendering herewith, under protest and duress, the payment of Four hundred and twenty-six 10/100 Dollars ($426.10), the amount of the assessment made against the undersigned by the Commissioner of Internal Revenue under Section II of the Act of Congress approved October 3, 1913, and commonly known as the Federal Income Tax Law, hereby protests against said assessment and the payment of said assessment specifically, but not exclusively, on the ground that, insofar as said assessment covers or includes, and said tax is levied on or against, income or profits derived from shipments of merchandise to foreign countries, it is a tax on exported merchandise and therefore in conflict with Section 9 of Article I of the Constitution of the United States, which provides that 'No tax or duty shall be laid on articles exported from any State.' 74 75

Respectfully submitted,

(Signed) Wm. E. Peck & Co.,
H. R. HILLARD, Treas."

Q. Did you, at the time this check was paid, and at the time the protest was given, receive any receipt from the Collector for the check? A. I did.

76 Plaintiff's Bill of Exceptions.

Q. I show you what purports to be such receipt, and ask you if you identify that as the receipt received at that time? A. It is.

Mr. Savage.—I offer the receipt in evidence.

The same was received and marked in evidence Plaintiff's Exhibit 5 and reads as follows:

"No. C. 432684.

UNITED STATES INTERNAL REVENUE.

77 OFFICE OF COLLECTOR.

Form No. 1

(Revised May 5, 1913).

2nd District of New York,

June 30, 1915.

Received of WILLIAM E. PECK & Co.,
Four hundred twenty six 10/100 Dollars
on account of Corporation Income Tax,
1914 ..... $426.10

Five Per cent. penalty.
Interest at 1 per cent. per month for
78 months.

Total amount paid $426.10

Paid under protest.
JOHN Z. LOWE, JR., Collector."

($426.10/100.)

Q. Did you make any claim for refund of the tax paid? A. I did.

Mr. Savage.—I have asked the Government to produce the original claim for re-

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fund, and the District Attorney states he has a certified copy of it, but would prefer that I put in the copy I have.

Q. I ask you, Mr. Hillard, do you identify that as the claim for the refund that you made? A. That is a copy of it.

Mr. Savage.—I offer that in evidence.

The same was received and marked in evidence Plaintiff's Exhibit 6 and reads as follows:

"Form 46.—Revised Nov., 1907.

F. C., Apr. 5-13.

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Claim under Series 7, No. 14, Revised, and Series 7, No. 27, Supplement No. 1, for taxes improperly paid, or refundable under remedial statutes and for amounts paid for stamps used in error or excess.

U. S. Internal Revenue.

State of New York,
County of New York, } ss.:

H. R. Hillard of the City of New York and State and County aforesaid, being duly sworn according to law, deposes and says, that he is Treasurer of William E. Peck & Co., Incorporated, that they 81
were engaged in the business of Export Commission Merchants, that upon day of ,
A. D. 1915, they were assessed an internal-revenue tax of Four hundred and twenty-six 10/100 dollars, One per cent. upon the net income derived from exports; which amount they afterwards, on the 29th day of June, A. D. 1915, paid to John Z. Lowe, Junior, Esq., Collector of Internal Revenue for the Second District of New York, and

82 which amount, as this deponent verily believes, should be refunded for the following reasons, viz:

That Section 2 of the Act of October 3rd, 1913, providing for a tax on income of individuals, corporations, joint stock companies, associations and insurance companies, is, in so far as this tax is imposed upon income derived from exports, in violation of Section 9, Article I of the Constitution of the United States which provides that "No tax or duty shall be laid on articles exported from any state."

And this deponent now claims that, by reason
83 of the payment of the said sum of Four hundred and twenty-six 10/100 dollars, they are justly entitled to have the sum of Four hundred and twenty-six 10/100 dollars refunded, and they now ask and demand the same.

And this deponent further makes oath that the said claimant is not indebted to the United States in any amount whatever, and that no claim has heretofore been presented for the refunding of the above amount, or any part thereof.

(Sgd) H. R. Hillard.

Sworn to and subscribed before me this
8th day of July, A. D. 1915.
84 (Sgd.) M. F. Stapleton, Jr.
N. Y. Co. No. 426; Reg. No. 7014."

Q. Do you know whether or not this claim for refund was rejected? A. I don't remember any answer to it.

Q. Did you ever receive any letter from the Collector that your claim had been rejected? A. My recollection is I did.

Q. I show you what purports to be a letter from the Collector, dated July 30, 1915, enclosing a

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copy of a letter from Commissioner Osborne, dated July 27, 1915, and ask you did you—do you remember receiving those? A. I remember them.

Mr. Savage.—I offer those in evidence.

The same were received and marked in evidence Plaintiff's Exhibits 7 and 8 and read respectively as follows:

"EJF
Office of the Collector,
Second District of New York,
Customhouse Building.

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TREASURY DEPARTMENT.
Internal Revenue Service,
New York, N. Y.
JULY 30, 1915.

WM. E. PECK & Co.,
104 Pearl Street,
New York City.

Sirs:

This office is in receipt of a letter from the authorities at Washington, under date of July 27th, a copy of which is herewith enclosed for your information, in connection with the rejection of your claim for refund.

The receipt referred to is also enclosed.

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Respectfully,
JOHN Z. LOWE, JR.,
Collector.
DCCS.

Enc.

(Endorsed
Recd. Jul. 31, 1915, Ans."
etc.)

88 Plaintiff's Bill of Exceptions.

"TREASURY DEPARTMENT,
WASHINGTON.

JULY 27, 1915.

CI—30096 R.

Rejecting claim of Wm. E. Peck & Co., Inc.,
JOHN Z. LOWE, JR., Esq.,
Collector, Second District,
New York, N. Y.

Sir:

The claim of William E. Peck & Company, Inc., of New York, for the refunding of $426.10 alleged
89 to have been erroneously paid as corporation income tax on account of the year 1914, has been examined.

The claim is based upon the following ground:

> "That Section 2 of the Act of October 3, 1913, providing for a tax on income of individuals, corporations, joint stock companies, associations and insurance companies, is, in so far as this tax is imposed upon incomes derived from exports, in violation of Section 9, Article I, of the Constitution of the United States which provides that 'No tax or duty shall be paid on articles exported from any State.' "

90 Section G of the Act mentioned provides that the normal tax imposed upon individuals shall likewise be assessed and paid annually upon the net income arising or accruing *from all sources* during the preceding calendar year.

It therefore appears that this assessment is correct according to claimant's return for the year in question, and the claim accordingly is hereby rejected.

You will please advise claimant of this action, returning the receipt which is herewith enclosed.

Respectfully,

(Signed) W. H. OSBORN,

Commissioner."

Mr. Savage.—I have asked the Government to produce the original rejection of Commissioner Osborne, and it is conceded that the letter that is introduced in evidence as Exhibit 8 is a true copy of the original rejection.

I understand the Government waives any question as to the voluntary nature of the tax—in other words, that the tax was paid by the plaintiff solely in order to prevent restraint and sale of its property, and upon compulsion and under duress and coercion, and involuntarily.

Q. Has any part of the tax which you paid been refunded, remitted, or repaid? A. No, sir none.

Q. Did you request the bookkeeper of the plaintiff to prepare an itemized statement showing the gross and net income of the plaintiff for the year ending December 31, 1914? A. Yes, I did.

Q. And did he prepare such a statement? A. Yes.

Q. I show you what purports to be such statement, and ask if that is the statement the bookkeeper handed you. A. That is the copy of it.

Q. Do you recollect what your net income, what the net income of the plaintiff was for that year? A. I can't tell offhand.

Q. Can you refresh your recollection by referring to that statement? A. Yes.

Q. Well, then, what was the net income of the plaintiff for the year ending December 31, 1914? A. $30,173.66, from exports.

94 Plaintiff's Bill of Exceptions.

Q. That income was derived solely from exportations? A. Yes.

Mr. Savage.—I offer this statement in evidence.

The same was received and marked in evidence Plaintiff's Exhibit 9 and reads as follows:

"Detailed Return of Net Income for the Calendar Year ending December 31st, 1914, by William E. Peck & Company

Kind of business Export

and located at 104 Pearl St., New York City, N. Y.

95 GROSS INCOME.

(a) From operations			
Amount received for goods exported for the calendar year ended Dec. 31, 1914		$3,753,539.97	
Merchandise on hand Jan. 1st, 1914	$47,957.63		
Merchandise purchased during 1914	$3472,100.06		
	$3520,057.69		
Merchndise on hand (unexported) December 31st, 1914	23,606.00		
Cost of goods exported	$3496,451.69	3,496,451.69	
Gross income from exports			$257,088.28
(b) None			
96 (c) Interest			
On domestic accts.	$2340.91 x		
" export "	1198.49		
" domestic bonds	2140.00 x		5,679.40
(d) Dividend from stock			x 600.00
(e) Cancellation of contract	$5000.00 x		
Profits from Insular Line	1261.66 x		
Amounts received for goods exported which have been heretofore charged off as losses	1806.32		
Profits on sale of mdse. imported	117.14 x		

Profits on sale of mdse. purchased and sold in foreign countries.....	434.13 x	
Profits on advertising contracts in foreign countries	542.40 x	
Profits from sales of exports to foreign agents, branches and customers (consignments) etc.....	28586.05	37,747.70
		$301,115.38
x Deduct income from other than export sources.....	600.00	
	2340.91	
	2140.00	
	5000.00	
	1261.66	98
	117.14	
	434.13	
	542.40	12,436.24
Total gross income from all export sources.....		$288,679.14
DEDUCTIONS:		
(a) General expenses:		
Agents commissions...	69,816.74	
" expenses	54,236.79	
Salaries of clerks, etc..	51,943.00	
" " officers	32,350.40	
Other expenditures including printing, stationery, and general office expenses.....	10,143.79	218,490.72
Rentals		10,450.00
Losses (bad debts).....		26,172.86 99
Depreciation and depletion.....		696.19
Interest paid on various forms (notes, etc.) of indebtedness		1,300.64
City and State Taxes.....		275.07
Foreign taxes.....		1,120.00
		$258,505.48
Total gross income from exports.....	$288,679.14	
" deductions	258,505.48	
NET INCOME FROM EXPORTS.....	$30,173.66."	

Q. That was derived solely from the exportation of goods to foreign countries? A. Yes, sir, exportation to foreign countries.

Q. And the plaintiff has no other business? A. Has no other business.

Cross-examination by Mr. Barnes:

Q. You are the Treasurer of the plaintiff? A. Yes.

Q. Now, does the plaintiff do any domestic business at all? A. None whatever.

Q. When you stated with reference to Exhibit 9 that that showed the net income of the plaintiff, you meant by that——

Q. (Interposing). I qualified that by saying net
101 income from exports.

Q. Now, referring to Exhibit 9, I notice under gross income, subdivision C, the paragraph relative to interest, an item "Interest on Export Accounts, $1,198.49." Do you find that? A. Yes.

Q. Just what is that? A. That is interest on balances due on export accounts in foreign countries.

Q. That is the interest due on money due to you from people in foreign countries, arising by reason of the sales of goods of domestic manufacture that you have sold abroad? A. Yes.

Q. Now, you have there, just before that, "Interest on domestic accounts, $2,340." What were
102 those accounts? A. That is made up practically of three accounts: Our balance in the New York Trust Company, we get two and a half and three and a half per cent., varying, on daily balances. That is the chief item; you can separate that as being the chief item. And there are, I think two accounts on our books—the President owes us money, and he pays us interest on it, and there is then one other domestic account on our books where we allow interest on daily balances.

Q. Well, you have sued here for $426.10. A. Yes.

Q. As I understand it now, you reduce your claim to $301.74, is that correct? A. Yes.

Q. So that it is conceded that under any theory the Government was entitled to assess you upon an income from domestic accounts of $12,436.24? A. That is right.

Q. So that the tax of $124.35 would have been due anyhow? A. That is right.

Q. Your complaint should be amended in that respect.

The Court.—The amount sued for should be reduced, you mean.

Mr. Barnes.—Yes, it simply reduces the amount sued for to $301.24.

Q. Now, this statement of income, plaintiff's Exhibit 9, was prepared under your supervision? A. Yes, sir.

Q. For the payment of the tax of your company? A. Yes.

Q. And is accurate? A. Absolutely.

Q. And the amount of $30,173.66 represents the profits made by your Company upon the sales of domestic goods in foreign markets? A. Absolutely.

Q. And possibly one or two other small items which are enumerated? A. No, that is all export, all other items are excluded.

Mr. Barnes.—That is all.

By the Court:

Q. You said, if I heard you correctly, that the business of the plaintiff was exporting—is that what you said? A. Yes.

Q. I want you to define that business and state in detail what you mean by the business of exporting. A. Our business is to secure in foreign countries, through our agents and representatives,

orders for American goods. We place those orders with the manufacturers, and they are shipped direct to the steamers carrying the stuff abroad, and we sell no goods to domestic customers in the United States. The goods all go to foreign countries, practically direct from the manufacturers, and we pay for those goods here, and make our collections from our customers in the foreign countries reimburse us.

Q. Then, apparently, your income is derived from buying at one price in the United States, and sending the goods so bought abroad, and
107 charging your customers a higher price than you yourself pay? A. That is it.

Q. You are responsible to the manufacturers or people in the United States from whom you buy? A. We are.

Q. And your money is collected from the persons or customers in foreign countries? A. Yes; the risk is entirely ours.

Q. So far as the foreign customer is concerned, you are the vendor? A. Yes.

The Court.—Anything more?

Mr. Savage.—We have here the bookkeeper whom we will put on the stand to
108 prove that statement.

Mr. Barnes.—That is not necessary. I will accept the statement.

Mr. Savage.—Very well.

That is our case. Our case is closed, and we ask for the direction of a verdict for $301.73.

The Court.—You ask a direction of a verdict for the defendant?

Mr. Barnes.—Yes, sir.

The Court after hearing argument on the motions for direction of a verdict, granted

the motion of defendant and directed that a verdict be entered for defendant.

FIRST EXCEPTION.

To which said ruling of the Court counsel for plaintiff duly excepted, which exception was duly allowed.

Plaintiff thereupon duly made a motion to set aside said verdict for defendant and for a new trial because said verdict is contrary to the evidence and contrary to the law. The Court after hearing argument on said motion, denied the motion.

SECOND EXCEPTION.

To which said ruling of the Court counsel for plaintiff duly excepted, which exception was duly allowed.

The foregoing constitutes the testimony and statement of all the evidence introduced and offered upon the trial of this cause. And plaintiff prays that this its bill of exceptions may be allowed, settled and sealed.

RALPH T. KEYSER,
Attorney for Plaintiff,
Office & P. O. Address:
15 William Street,
New York City.

Settled and allowed this 23rd day of June, 1916, on consent.

C. M. HOUGH,
District Judge.

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Petition for Writ of Error.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WILLIAM E. PECK & COMPANY, INCORPORATED,

vs.

JOHN Z. LOWE, JR., Collector of
113 Internal Revenue, Second District of New York.

Now comes William E. Peck & Company, Incorporated, plaintiff herein, and says:

That on or about the 15th day of June, 1916, the United States District Court, Southern District of New York entered a judgment herein in favor of the defendant and against this plaintiff in which judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assign-
114 ment of errors which is filed with this petition.

WHEREFORE, this plaintiff prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause duly authenticated, may be sent to the Supreme Court of the United States, and that such other

and further proceedings may be had as are proper in the premises.

Dated, New York, June 28, 1916.

RALPH T. KEYSER,
Attorney for Plaintiff,
Office & P. O. Address,
15 William Street,
Borough of Manhattan,
New York City.

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118 **Assignment of Errors.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WILLIAM E. PECK & COMPANY, INCORPORATED, *vs.* JOHN Z. LOWE, JR., Collector of Internal Revenue, Second District of New York.	L—14—299.

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Plaintiff in this cause in connection with its petition for a writ of error makes the following assignment of errors which it avers exist:

First.—The Court erred in refusing to grant the relief as prayed for in plaintiff's complaint.

Second.—The Court erred in granting defendant's motion for a direction of the verdict for defendant, and in directing verdict for defendant.

Third.—The Court erred in denying plaintiff's motion for a direction of the verdict for plaintiff, and in refusing to direct and in not directing verdict for plaintiff.

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Fourth.—The Court erred in granting judgment in favor of defendant and against plaintiff.

WHEREFORE, plaintiff prays that said judgment be reversed.

RALPH T. KEYSER,
Attorney for Plaintiff,
Office & P. O. Address,
15 William Street,
Borough of Manhattan,
New York City.

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Order Allowing Writ of Error.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WILLIAM E. PECK & COMPANY, Incorporated,

vs.

JOHN Z. LOWE, JR., Collector of Internal Revenue, Second District of New York.

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Now comes William E. Peck & Company, Incorporated, plaintiff, by its attorney and files herein and presents to the court its petition praying for the allowance of a writ of error, and an assignment of errors intended to be urged by plaintiff, praying also that a transcript of the record and proceedings and papers in this cause duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as are proper in the premises.

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On consideration whereof the court does allow the writ of error upon plaintiff giving bond according to law in the sum of Five Hundred ($500.00) Dollars which shall operate as a supersedeas bond.

Dated June 29, 1916.

J. M. MAYER,
District Judge.

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Writ of Error.

THE UNITED STATES OF AMERICA, ss.

The President of the United States of America to the Judges of the United States District Court, Southern District of New York, Greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in said District Court, before you, between WILLIAM E. PECK & COMPANY, Incorporated, and JOHN Z. LOWE, JR., Collector of Internal Revenue,
125 Second District of New York, defendant, a manifest error has happened to the great damage of said William E. Peck & Company, Incorporated, as by its complaint appears. We being willing that the error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly you send a transcript of the record and proceedings and papers in this cause duly authenticated with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the City of Washington on the
126 27th day of July, 1916, in the said Supreme Court, to be then and there held, that the record, proceedings and papers aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable Edward D. White, chief justice of the United States, the 29th day of

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June, in the year of our Lord, one thousand nine hundred and sixteen, and of the independence of the United States of America the one hundred and fortieth.

ALEX. GILCHRIST, JR.,
[SEAL] Clerk of the U. S. District Court,
Southern District of New York.

Allowed by

J. M. MAYER,
District Judge.

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129

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Citation.

THE UNITED STATES OF AMERICA, ss.:

JOHN Z. LOWE, JR., Collector of Internal Revenue, Second District of New York, Greeeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the City of Washington on the 27th day of July, 1916, pursuant to writ of error filed in the clerk's office of the United States District Court, Southern District of New York wherein William E. Peck & Company, Incorporated, is
131 plaintiff, and you are defendant in error, to show cause, if any there be why a judgment rendered against said plaintiff in error as in the said writ of error mentioned should not be corrected, and speedy justice be done to the parties in that behalf.

Given under my hand at the City of New York in the district above named this 29th day of June, in the year of our Lord, one thousand nine hunred and sixteen.

J. M. MAYER,
Judge of the U. S. District Court,
Southern District of New York.

132 (Served on attorney for defendant and filed in Clerk's office, U. S. D. C., S. D. of N. Y., on July 10, 1916.)

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Stipulation of Counsel.

Pursuant to Rule 8 of the Supreme Court of the United States, it is hereby stipulated that the foregoing subpoena, complaint, answer, opinion of District Judge, order directing verdict for defendant, order denying motion to set aside verdict and for new trial, judgment for defendant, bill of exceptions, petition for writ of error, assignment of errors, order allowing writ of error, writ of error and citation, constitute the transcript of record on writ of error, and true copy of the record, and of the assignment of errors, and of all proceedings in the case of William E. 134
Peck & Company, Incorporated, plaintiff, against John Z. Lowe, Jr., Collector of Internal Revenue, Second District of New York, and the Clerk of the United States District Court, Southern District of New York may transmit to the Supreme Court of the United States pursuant to said writ of error only the papers above designated.

Dated, July 24th, 1916.

RALPH T. KEYSER,
Attorney for Plaintiff in Error.

H. SNOWDEN MARSHALL,
United States Attorney. 135
Attorney for Defendant in Error.

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Certificate of Clerk.

UNITED STATES OF AMERICA, }
Southern District of New York, } ss.:

I, ALEXANDER GILCHRIST, JR., Clerk of the United States District Court, Southern District of New York, do hereby certify the above and foregoing to be a true copy of the record, and of the assignment of error, and of all proceedings in the case of WILLIAM E. PECK & COMPANY, Incorporated, plaintiff, against John Z. Lowe, Jr., Collector of Internal Revenue, Second District of New York, as agreed upon by the stipulation of
137 counsel filed in said case.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at my office, in the Borough of Manhattan, City, County and State of New York, Southern District of New York, this 24th day of July, 1916.

ALEX. GILCHRIST, JR.,
[SEAL] Clerk of the U. S. District Court,
Southern District of New York.

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In the Supreme Court of the United States.

OCTOBER TERM, 1916.

WILLIAM E. PECK AND COMPANY, INC., Plaintiff in Error,
v.
JOHN Z. LOWE, COLLECTOR OF INTERNAL REVENUE, &c.
} No. 590.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO ADVANCE.

Comes now the Solicitor General, appearing on behalf of defendant in error, and respectfully moves the court to advance the above-entitled cause for hearing on a day convenient to the court *during the next term.*

This suit was brought by plaintiff in error in the District Court of the United States for the Southern District of New York to recover taxes assessed against plaintiff in error by the Collector of Internal Revenue for the Second District of New York under the provisions of the so-called "Income Tax Law" of October 3, 1913, 38 Stat. 114, 166, and paid to said col-

lector under protest. Recovery was prayed on the ground that the assessment having been made on income of plaintiff in error derived from exports to foreign countries, it was illegal and void as a tax on exports, and the "Income Tax Law" in so far as it imposes a tax on incomes derived from exports is in violation of that provision of the Constitution which provides that "No tax or duty shall be laid on Articles exported from any State."

The District Court held that the assessment was not a tax upon exports within the meaning of the Constitution, rendered judgment for the collector, and allowed a writ of error direct from this court.

The case is of importance not only to the Treasury Department in the administration of the law involved, but also to the vast number of persons and firms engaged in the export trade, and is therefore one which involves the general public interest. For these reasons an early determination thereof by this court is desirable.

Opposing counsel concur.

JOHN W. DAVIS,
Solicitor General.

MARCH, 1917.

O

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Office Supreme Court, U. S.
FILED
OCT 1 1917
JAMES D. MAHER

No. 234

In the Supreme Court of the United States

OCTOBER TERM, 1917.

WILLIAM E. PECK & COMPANY, *Incorporated*,
Plaintiff in Error.

vs.

JOHN Z. LOWE, JR., *Collector of Internal Revenue, Second District of New York*,
Defendant in Error.

MOTION TO REASSIGN.

Comes now the plaintiff in error and moves the court to reassign this case for hearing on the.....day of....., 1917.

JOHN C. SPOONER,
RICHARD V. LINDABURY,
CHARLES P. SPOONER,
RALPH T. KEYSER,
Counsel.

No. 234

In the Supreme Court of the United States

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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1917.

No. 234

WILLIAM E. PECK & COMPANY, INCORPORATED,
Plaintiff in Error,

vs.

JOHN Z. LOWE, Jr., Collector of Internal Revenue, Second District of New York,
Defendant in Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

The questions involved come to this Court upon a writ of error to the District Court of the United States for the Southern District of New York. The follow-

ing facts appear from the record: The plaintiff in error is a West Virginia corporation authorized to buy and sell goods, wares and merchandise in the United States and foreign countries, either as principal or on commission or consignment (Record, pp. 18, 19). It has a place of business in the City of New York and does business in foreign countries, principally South America and Australia. Its business in the year 1914 was that of exporting American goods to foreign countries (Record, pp. 20, 21). Its method of doing business was and is to secure in foreign countries, through its agents and representatives, orders for American goods, and to buy the goods from the manufacturers, paying for them here, sell them to its customers in the foreign countries, ship them to the foreign countries, and receive payment by collections from its customers in the foreign countries (Record, pp. 35, 36). It was notified on May 25, 1915, by the defendant, that it had been assessed the sum of $426.10 as an income tax, under Section 2 of the Act of October 3, 1913 (38 Stat. at L. 114, Chap. 16), and that payment must be made within the date mentioned in the notice, said notice being the usual notice under the Income Tax Law (Record, pp. 21, 22). The plaintiff paid the amount of said assessment to the defendant, accompanying the payment with a protest that insofar as the assessment covered, or the tax was levied on or against income or profit derived from shipments of merchandise to foreign countries, it was a tax on exported merchandise and, therefore, in conflict with Section 9 of Arti-

cle 1 of the Constitution of the United States, providing that "no tax or duty shall be laid on articles exported from any State" (Record, pp. 24, 25). The defendant rendered a receipt for the payment "on account of Corporation Income Tax 1914" which receipt contained the statement that the payment was "paid under protest" (Record, p. 26). On or about July 8, 1915, the plaintiff made a claim for refund of the tax, setting forth therein its ground therefor (Record, pp. 27, 28), and on or about July 31, 1915, received from the defendant a letter from the Commissioner of Internal Revenue, rejecting the claim upon the ground that the act under which the tax was levied authorized the imposition of a tax upon income arising or accruing "from all sources" (Record, pp. 29, 30, 31).

The plaintiff thereupon sued the defendant in the District Court for the recovery of the amount paid, upon the ground that the assessment was in violation of Section 9 of Article 1 of the Constitution of the United States. (Complaint appears in the Record, pp. 2, 3, 4, 5, 6). The defendant's answer put this contention in issue (Record, pp. 7, 8, 9). It appears by the evidence that no part of the tax paid had ever been refunded, remitted or repaid, and that the net income of the plaintiff for the year ending December 31, 1914, amounting to $30,175.66, was derived solely from exportations of goods to foreign countries. A statement (being Plaintiff's Exhibit 9) was put in evidence, showing the method of arriving at such net income. From this

statement and the testimony, it appeared that the amount assessed and paid on income derived from exports was properly $301.24, and the complaint was accordingly considered amended so as to conform to that figure (Record, pp. 32, 33, 34, 35). Upon the conclusion of the evidence, both parties moved for a directed verdict, and the District Court overruled the motion of plaintiff and granted that of defendant (Record, p. 10). (The opinion of the lower court appears in the Record, pp. 10, 11, 12.) A motion for a new trial was made by plaintiff and denied, and judgment entered for the defendant (Record, pp. 15, 16).

Assignment of Errors.

The errors assigned, are:

First: The Court's refusal to grant the relief prayed for in the complaint;

Second: The granting by the Court of the motion of the defendant for direction of verdict, and the directing of verdict for defendant;

Third: The Court's denial of motion of plaintiff for direction of verdict, and its refusal and failure to direct verdict for the plaintiff;

Fourth: The granting of judgment in favor of the defendant and against the plaintiff (Record, p. 40).

The foregoing assignments of error amount substantially to the single contention that the lower court

should have directed a verdict for, and entered judgment in favor of, the plaintiff and against the defendant.

Contention of Plaintiff in Error.

The tax, for the recovery of which this action was brought, is a tax upon the income of plaintiff in error, derived wholly from exports to foreign countries. As such, it is a tax upon exports, the source from which the income is derived, and is prohibited by Clause 5, Section 9, Article 1 of the Constitution, providing that "no tax or duty shall be laid on articles exported from any State".

Outline of Argument.

First.

Congress is, by Clause 5, Section 9 of Article 1 of the Constitution, as construed by this Court, prohibited from laying any burden upon exportation.

Second.

The Sixteenth Amendment to the Constitution has not enlarged the taxing power of Congress or affected the prohibition against its burdening exports.

Third.

The tax, for the recovery of which this action is brought, was assessed, levied and collected under the

Income Tax section of the Tariff Act of October 3, 1913 (*supra*), and is solely an income tax.

FOURTH.

A tax upon income derived wholly from exports is a tax upon exports, and the tax upon plaintiff in error is, therefore, unconstitutional and void.

(*a*) Congress may no more burden exports and exportation by indirection than by a tax directly upon the articles exported; the substance and effect, and not the form of the tax, controls.

(*b*) A tax on income is a tax on the source from which the income is derived.

(*c*) A tax on the income of plaintiff in error is, under the foregoing principles and decisions, unconstitutional and void.

FIFTH.

The exemption from taxation of income derived from exports is based upon sound economic and national principles.

SIXTH.

The opinion of the District Court.

FIRST.

Congress is, by Clause 5, Section 9 of Article 1 of the Constitution, as construed by this Court, prohibited from laying any burden upon exportation.

The provision of the Constitution of the United States which controls in this case is as follows:

> "No tax or duty shall be laid on articles exported from any State" (Clause 5, Section 9, Article 1).

It is well settled that by this provision the power to tax exports was deliberately and specifically excepted from the powers granted to Congress by the Constitution. It is one of the two great exceptions to the Federal power to tax, the other being that Congress may not tax the power and instrumentalities of the States. The prohibition is complete and comprehensive and is not qualified by any limitation whatever, and hence when a tax is adjudged to fall upon exports or be a tax on exports or relating to exports, it is prohibited, no matter what the kind, class, quality, or method of the tax may be, whether direct or indirect, personal or excise, income or stamp tax, privilege or property tax, or whether levied on gross receipts or net receipts, or on the goods exported or the documents representing the goods, or on the transactions as a whole or on any part or customary incident thereof. This Court has con-

stantly and consistently enforced this constitutional prohibition to its full meaning and effect.

In *Fairbank* v. *United States*, in which it was successfully contended that a stamp tax on a bill of lading for export was a tax on exports (181 U. S. 283), the Court said (p. 289):

> "If powers granted are to be taken as broadly granted, and as carrying with them authority to pass those acts which may be reasonably necessary to carry them into full execution; in other words, if the Constitution in its grant of powers is to be so construed that Congress shall be able to carry into full effect the powers granted, it is equally imperative that where prohibition or limitation is placed upon the power of Congress that prohibition or limitation should be enforced in its spirit and to its entirety. It would be a strange rule of construction that language granting powers is to be liberally construed, and that language of restriction is to be narrowly and technically construed. Especially is this true when in respect to grants of powers there is, as heretofore noticed, the help found in the last clause of the 8th section, and no such helping clause in respect to prohibitions and limitations. The true spirit of constitutional interpretation in both directions is to give full, liberal construction to the language, aiming ever to show fidelity to the spirit and purpose."

On page 290 it is said:

> "The requirement of the Constitution is that exports should be free from any governmental

burden. The language is, 'no tax or duty'. Whether such provision is or is not wise is a question of policy with which the courts have nothing to do. We know historically that it was one of the compromises which entered into and made possible the adoption of the Constitution. It is a restriction on the power of Congress; and, as in accordance with the rules heretofore noticed, the grants of powers should be so construed as to give full efficiency to those powers and enable Congress to use such means as it deems necessary to carry them into effect, so in like manner a restriction should be enforced in accordance with its letter and spirit, and no legislation can be tolerated which, although it may not conflict with the letter, destroys the spirit and purpose of the restriction imposed."

On pages 292 and 293 it is said (the italics are ours):

"Counsel for the government, in his interpretation of the scope and meaning of this constitutional limitation, says:

"'To give Congress the power to lay a tax or duty "on articles exported from any state" meant to authorize inequality as among the states in the matter of taxation. If the north happened in control in Congress, it might tax the staples of the south; if the south were in power, it might place a duty on the exports of the north. As a part, therefore, of the great compromise between the north and the south, this clause was inserted in the Constitution.

The prohibition was applied, not to the taxing of the act of exportation or the document evidencing the receipt of goods for export, for these exist with substantial uniformity throughout the country, but to the laying of a tax or duty on the article exported, for these could not be taxed without discriminating against some states and in favor of others'."

"This argument does not commend itself to our judgment. Its implication is that the sole purpose of this constitutional restriction was to prevent discrimination between the states by imposing an export tax on certain articles which might be a product of only a few of the states, and which should be enforced only so far as necessary to prevent such discrimination. If mere discrimination between the states was all that was contemplated, it would seem to follow that an ad valorem tax upon all exports would not be obnoxious to this constitutional prohibition. But surely under this limitation Congress can impose an export tax neither on one article of export, nor on all articles of export. In other words, the purpose of the restriction is that exportation—all exportation—shall be free from national burden. This intent, although obvious from the language of the clause itself, is reinforced by the fact that in the constitutional convention Mr. Clymer moved to insert after the word 'duty' the words 'for the purpose of revenue', but the motion was voted down. *So it is clear that the framers of the Constitution intended, not merely that exports should not be made a source of revenue to the national govern-*

> *ment, but that the national government should put nothing in the way of burden upon such exports.* If all exports must be free from national tax or duty, such freedom requires, not simply an omission of a tax upon the articles exported, but also a freedom from any tax which directly burdens the exportation; and, as we have shown, a stamp tax on a bill of lading, which evidences the export, is just as clearly a burden on the exportation as a direct tax on the article mentioned in the bill of lading as the subject of the export."

The decision in the Fairbank case was cited and reaffirmed in the recent case of *United States* v. *Hvoslef*, 237 U. S. 1, wherein this Court held a tax upon charter parties unconstitutional because a tax upon exports, and again in *Thames and Mersey Marine Ins. Co.* v. *United States*, 237 U. S. 18, in which a tax on policies of marine insurance was declared unconstitutional for the same reason.

SECOND.

The Sixteenth Amendment to the Constitution has not enlarged the taxing power of Congress or affected the prohibition against its burdening exports.

The tax in the case at bar was imposed by the Act of Congress, approved October 3, 1913 (38 Stat. at L. 114, Chap. 16, Section II). This act was enacted,

without apportionment, under the authority conferred by the Sixteenth Amendment to the Constitution, which is as follows:

> "The Congress shall have power to lay and collect taxes on income, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

It is now well settled that this amendment did not add in any way to the taxing power of Congress. In the recent case of *Brushaber* v. *Union Pacific Railway Co.*, 240 U. S. 1, this Court said (p. 18):

> "* * * the whole purpose of the Amendment was to relieve all income taxes when imposed from apportionment from a consideration of the source whence the income was derived."

And in the subsequent case of *Stanton* v. *Baltic Mining Company, et al.*, 240 U. S. 103, on page 112 the Court said (Italics and words in parentheses are ours):

> "* * * by the previous ruling (in the Brushaber case) it was settled that *the provisions of the Sixteenth Amendment conferred no new power of taxation*, but simply prohibited the previous complete and plenary power of income taxation possessed by Congress from the beginning from being taken out of the category of indirect taxation to which it inherently belonged and being placed in the category of direct taxation subject to apportionment by a considera-

tion of the sources from which the income was derived, that is, by testing the tax not by what it was—a tax on income, but by a mistaken theory deduced from the origin or source of the income taxed. *Mark, of course, in saying this we are not here considering a tax not within the provisions of the Sixteenth Amendment, that is, one in which the regulation of apportionment or the rule of uniformity is wholly negligible because the tax is one entirely beyond the scope of the taxing power of Congress and where consequently no authority to impose a burden either direct or indirect exists.*"

The tax in the case at bar is a tax "not within the provisions of the Sixteenth Amendment" because it is "one entirely beyond the scope of the taxing power of Congress and where consequently no authority to impose a burden either direct or indirect exists". As the Sixteenth Amendment "conferred no new power of taxation", the *power* of Congress to tax incomes is to-day just the same as, and no more than (except that it need not apportion an income tax), its power to tax incomes at the time of the decision in the case of *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, and 158 U. S. 601, when this Court unanimously held (158 U. S. 601) that Congress could not tax the income from a source which it could not tax. Hence in the case at bar, as Congress cannot tax the exports of the plaintiff, so it cannot tax the income from such exports.

This construction of the Sixteenth Amendment by this Court, holding that no new power of taxation was

thereby conferred on Congress, confirms the view of its meaning which prevailed in Congress and among the States while the amendment was before the States for ratification, and in reliance upon which meaning the amendment was ratified. While the amendment was before the Legislature of the State of New York the Governor of that State questioned, in a message to the Legislature, whether its terms might not have the effect of giving to Congress the power to tax incomes derived from bonds issued by a State or municipalities under its authority. This called forth a letter from Hon. Elihu Root, then a member of the United States Senate from New York, to a member of the Legislature of that State, in which Senator Root said (Congressional Record of March 1, 1910, Vol. 45, Part 3, p. 2539):

> "The objection made to the amendment is that this will confer upon the National Government the power to tax incomes derived from bonds issued by the States or under the authority of the States and will place the borrowing capacity of the State and its governmental agencies at the mercy of the Federal taxing power.
>
> "I do not find in the amendment any such meaning or effect. I do not consider that the amendment in any degree whatever will enlarge the taxing power of the National Government or will have any effect except to relieve the exercise of that taxing power from the requirement that the tax shall be apportioned among the several States. The effect of the amend-

ment will be, in my view, the same as if it said, 'The United States may lay a tax on incomes without apportioning the tax, and this shall be applicable whatever the source of the income subjected to the tax', leaving the question 'What incomes are subject to national taxation?' to be determined by the same principles and rules which are now applicable to the determination of that question."

Prior to the publication of this letter, Senator Borah of Idaho had said in the United States Senate (Congressional Record of February 10, 1910, Vol. 45, Part 2, p. 1694):

"In other words, Mr. President, when this amendment says, 'from whatever source derived', that must be a source within the jurisdiction and taxing power of the nationality which lays the tax.

* * * * * * *

"Chief Justice Marshall, in laying down the rule of taxation in the case to which I have already called attention, says in another part of the decision:

"'All subjects over which the sovereign power of a State extends are objects of taxation. But those over which it does not extend are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident. Sovereignty of a State extends to everything which exists by its own authority or is introduced by its permission; but does it extend

to those means which are employed by Congress to carry into execution the powers conferred on that body by the people of the United States? We think it demonstrable that it does not.'"

THIRD.

The tax, for the recovery of which this action is brought, was assessed, levied and collected under the Income Tax Section of the Tariff Act of October 3, 1913, and is solely an income tax.

We claim that the tax here involved is a tax upon income as such. That fact seems to be clearly demonstrable, but we do not wish to be understood as suggesting that our case stands or falls upon this construction of the taxing act. This Court looks at the substance and effect of a tax and not its form, and we no more concede the power of Congress to evade the constitutional prohibition by burdening exports under the guise of a license or occupation tax, than by a tax on export income. No matter how disguised, the Federal government may not burden exportation.

The act of Congress under which the tax here in question was assessed and collected (the Income Tax Section of the Tariff Act of October 3, 1913, ch. 16, 38 Statutes at Large) was enacted, without apportionment, under the authority conferred by the Sixteenth

Amendment. As this amendment relates entirely to income taxes the tax imposed by the act must be an income tax. And the Court said in *Brushaber* v. *Union Pacific Ry. Co.* (*supra*) (p. 20):

> "The statute was enacted October 3, 1913, and provided for a general yearly income tax from December to December of each year."

The tax is not upon capital or property or occupations but, as the Court has said, is "a general income tax."

In its income tax provisions the act first imposes a tax "upon the entire net income" of individuals and then in express terms imposes a tax "likewise" upon the income of corporations, etc. The tax, both by express statement and every possible implication, is upon the income. This is also made clear by the difference in language between the act of August 5, 1909 (36 Stat. at L., ch. 6, sec. 38) and the act of October 3, 1913 (*supra*). The former act stated (36 St. L., p. 112) "that every corporation * * * shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation * * * equivalent to one per centum upon the entire net income over and above five thousand dollars received by it." The latter act omits this or any similar language and states (38 St. L., p. 172) "that the normal tax hereinbefore imposed upon individuals likewise shall be levied, assessed and paid annually upon the entire net income arising or accruing from all sources during the preceding calendar year to every corporation."

Congress, like any other legislative body, is presumed to be guided, in framing the language of a statute, by prior judicial decisions, especially of this Court, and to use or not use words in accordance with the meaning given to them in such decisions. Hence Congress in the enactment of the act of October 3, 1913 (*supra*), by omitting the language of the act of August 5, 1909 (*supra*), which, by the decision of this Court, made the tax imposed by that act "an excise upon the particular privilege of doing business in a corporate capacity" (*Flint* v. *Stone Tracy Co.*, 220 U. S. 106, p. 151), made the tax imposed by the act of October 3, 1913 (*supra*), a general yearly income tax (*Brushaber* v. *Union Pacific Ry. Co.*, *supra*), which falls on the income of a corporation exactly as it does on that of an individual. It is a tax upon the revenues of individuals and corporations alike, and no privilege of any kind is involved in it.

The Income Tax Section of the Act of October 3, 1913 (*supra*) is, in terms and intent, substantially identical with the Income Tax Section of the Act of August 28, 1894 (28 Stat. at L., p. 509, Chap. 349). A comparison of the language of the two acts shows this. The Act of 1894 declares that the tax

> "shall be assessed * * * and paid annually upon the gains, profits, and income received * * * by every citizen * * *" (28 Stat. L., p. 553).
>
> "shall be assessed * * * and collected * * * annually on the net profits or income

> * * * of * * * and all other corporations * * * doing business for profit in the United States * * *" (28 Stat. L., p. 556).

The Act of 1913 declares that the tax

> "shall be * * * assessed * * * and paid annually upon the entire net income arising or accruing from all sources * * * to every citizen * * *" (38 Stat. L., p. 166).
>
> "The normal tax hereinbefore imposed upon individuals likewise shall be * * * assessed and paid annually upon the entire net income arising or accuing from all sources * * * to every corporation * * *" (38 Stat. L., p. 172).

The circumstances of the time, as well as the language of the Act of 1913, show that it was the intent of Congress in this act to impose an income tax like that of the Act of 1894, inasmuch as the Act of 1913 was prepared and adopted with reference to the ratification of the Sixteenth Amendment, which removed the one constitutional requirement (apportionment) the lack of which had been held to invalidate the Act of 1894.

Hence the unanimous decision of the Court in the Pollock case (*supra*) that a tax on the income derived from State and municipal securities is invalid, must apply in full force to the tax imposed by the Act of

1913, as was recognized by Congress at the time of its enactment. If Congress had not exempted income from municipal and State bonds in the Act of October 3, 1913, the constitutionality of the tax upon such income would have come before this Court just as it did under the Act of 1894 (*supra*) in the Pollock case. Nor could it be doubted that the Court would, in that event, have found such tax unconstitutional just as it did in the Pollock case and for the same reason.

The constitutional prohibition against taxing exports is just as complete and unqualified as is the constitutional prohibition against taxing State instrumentalities. Moreover, it is express, whereas the other is derived by implication. Whatever may have been the fact about State instrumentalities, the framers of the Constitution certainly had definitely in mind the protection of exports. Because of the constitutional implication, a tax on income from State instrumentalities is declared to be a tax on such instrumentalities and hence unconstitutional. Because of an express constitutional prohibition, a tax on income from exports must, we submit, be declared to be a tax on such exports and hence unconstitutional. Any other decision would upset the confirmed and accepted principle and reason of the Court upon constitutional limitations.

FOURTH.

A tax upon income derived from exports, by whatever name it is called, is a tax upon exports, and the tax upon plaintiff is therefore unconstitutional and void.

(*a*) Congress may no more burden exports and exportation by indirection than by a tax directly upon the article exported; the substance and effect and not the form of a tax controls.

The constitutional provision is that "no tax or duty shall be laid on articles exported from any State". This Court has construed that provision to mean that exports and exportation shall be free from all governmental burdens. Lest it be contended that because the tax here involved is a tax upon "income" merely and not upon articles exported or exportation, we cite a few cases under this heading to the effect that if a forbidden source of taxation or subject of regulation is affected, the form of the tax or law accomplishing the forbidden result is immaterial. Congress has no power to impose any tax which falls upon exportation, whether such tax be called an occupation tax, a privilege tax, or by any other name.

In *Brown* v. *Maryland*, 12 Wheaton, 419, the Court held that the *substance* and not the *form* controls, and

that a tax on the occupation of an importer is a tax on the importation. Chief Justice Marshall said (p. 445):

> "Now suppose the United States should require every exporter to take out a license, for which he should pay such tax as congress might think proper to impose; would government be permitted to shield itself from the just censure to which this attempt to evade the prohibitions of the constitution would expose it, by saying that this was a tax on the person, not on the article, and that the legislature had a right to tax occupations? Or suppose revenue cutters were to be stationed off the coast for the purpose of levying a duty on all merchandise found in vessels which were leaving the United States for foreign countries; would it be received as an excuse for this outrage, were the government to say that exportation meant no more than carrying goods out of the country, and as the prohibition to lay a tax on imports, or things imported, ceased the instant they were brought into the country, so the prohibition to tax articles exported ceased when they were carried out of the country?"

In *Cook* v. *Pennsylvania*, 97 U. S. 566, reaffirming *Welton* v. *Missouri*, 91 U. S. 275, the Court held that a tax on dealers in goods, or on sales, is a tax on the goods sold.

In *Philadelphia and Southern Steamship Company* v. *Pennsylvania*, 122 U. S. 326, it was held that a tax on

the income or receipts from interstate commerce is a tax on such commerce.

The Court said (p. 336):

> "If, then, the commerce carried on by the plaintiff in error in this case could not be constitutionally taxed by the state, could the fares and freights received for transportation in carrying on that commerce be constitutionally taxed? If the state cannot tax the transportation, may it, nevertheless, tax the fares and freights received therefor? Where is the difference? Looking at the substance of things, and not at mere forms, it is very difficult to see any difference. The one thing seems to be tantamount to the other. It would seem to be rather metaphysics than plain logic for the state officials to say to the company: 'We will not tax you for the transportation you perform, but we will tax you for what you get for performing it.' Such a position can hardly be said to be based on a sound method of reasoning."

In *Leloup* v. *Port of Mobile*, 127 U. S. 640 (The Western Union Telegraph case), the Court said (p. 645):

> "Ordinary occupations are taxed in various ways, and, in most cases, legitimately taxed. But we fail to see how a State can tax a business occupation when it cannot tax the business itself. Of course, the exaction of a license tax, as a condition of doing any particular business, is a tax on the occupation; and a tax on the

occupation of doing a business is surely a tax on the business."

The Court then referred to the principles which should govern the construction of the Constitution, and added (p. 648):

> "In our opinion such a construction of the Constitution leads to the conclusion that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce and amounts to a regulation of it, which belongs solely to Congress. This is the result of so many recent cases that citation is hardly necessary."

In *Fairbank* v. *United States*, 181 U. S. 283, the Court, at page 294, referred to the decision in *Woodruff* v. *Parham*, 8 Wall. 123, as affirming the great principle that what cannot be done directly because of constitutional restriction cannot be accomplished indirectly by legislation which accomplishes the same result. It then said:

> "But that principle is not dependent alone upon the case cited. It was recognized long anterior thereto in *Brown* v. *Maryland*, 12 Wheat. 419. In that case it appeared that the

State of Maryland, in order to raise a revenue for state purposes, required all importers of certain foreign articles to take out a license before they were authorized to sell the goods so imported, and it was held that such license tax, although in form a tax upon the person importing for the privilege of selling the goods imported, was in fact a tax on imports, and that the mode of imposing it by giving it the form of a tax on the occupation of importer merely varied the form without changing the substance. The argument in the opinion in that case, announced by Chief Justice Marshall, remains unanswered. As the States cannot directly interfere with the freedom of imports they cannot by any form of taxation, although not directly on the importation, restrict such freedom, Congress alone having the power to prescribe duties therefor. *In like manner the freedom of exportation being guaranteed by the Constitution it cannot be disturbed by any form of legislation which burdens that exportation. The form in which the burden is imposed cannot vary the substance.*" (The italics are ours.)

See also to the same effect as the Fairbank case:

United States v. *New York and Cuba Mail Steamship Company*, 200 U. S. 488.

United States v. *Hvoslef*, 237 U. S. 1.

Thames and Mersey M. Ins. Co. v. *United States*, 237 U. S. 18.

In *State* v. *E. Allgeyer & Co. et al.* (110 La. 839), the Supreme Court of Louisiana held that a license tax

upon the business of a buyer of cotton for export is a duty upon exports within the meaning of the Federal Constitution. The Court said:

> "This is a rule against defendants to show cause why they should not be condemned to pay the state a license for conducting the business of cotton buyers. Defendants show that their business consists entirely in filling orders which they receive from abroad for the buying of cotton; that is, they receive the orders, buy the cotton for their foreign clients, who give the orders, and ship the cotton to the foreign country. Defendants clearly are merely exporters, and it is well settled that a tax upon the importer or exporter is an impost or duty upon imports or exports within the meaning of the prohibition of the Constitution of the United States against the laying of imposts by the states."

Apparently the tax authorities of the State did not appeal to the Federal Court from this decision. Among the cases in this Court which were referred to by the Louisiana Court as affording the basis for its decision were: *Fairbanks* v. *United States* (*supra*); *Brown* v. *Maryland* (*supra*); *Welton* v. *Missouri* (*supra*); *Low* v. *Austin* (13 Wall. 29); *Cook* v. *Pennsylvania* (*supra*); *Leloup* v. *Port of Mobile* (*supra*), and *Webber* v. *Virginia* (103 U. S. 344).

In *Welton* v. *Missouri* (*supra*) this Court said (p. 278):

> "The license charge exacted is sought to be maintained as a tax upon the calling. It was

held to be such a tax by the Supreme Court of the State; a calling, says the court, which is limited to the sale of merchandise not the growth or product of the State."

"The general power of the State to impose taxes in the way of licenses upon all pursuits and occupations within its limits is admitted, but, like all other powers, must be exercised in subordination to the requirements of the Federal Constitution. Where the business or occupation consists in the sale of goods, the license tax required for its pursuit is, in effect, a tax upon the goods themselves. If such a tax be within the power of the State to levy, it matters not whether it be raised directly from the goods, or indirectly from them through the license to the dealer; but, if such tax conflict with any power vested in Congress by the Constitution of the United States, it will not be any the less invalid because enforced through the form of a personal license."

In *Low* v. *Austin* (*supra*) this Court said (p. 34):

"The Supreme Court of California appears, from its opinion, to have considered the present case as excepted from the rule laid down in *Brown* v. *The State of Maryland*, because the tax levied is not directly upon imports as such and, consequently, the goods imported are not subjected to any burden as a class, but only are included as part of the whole property of its citizens which is subjected equally to an *ad valorem* tax. But the obvious answer to this

position is found in the fact, which is, in substance, expressed in the citations made from the opinions of Marshall and Taney, that the goods imported do not lose their character as imports, and become incorporated into the mass of property of the State, until they have passed from the control of the importer, or been broken up by him from their original cases. Whilst retaining their character as imports, a tax upon them in any shape is within the constitutional prohibition. The question is not as to the extent of the tax, or its equality with respect to taxes on other property, but as to the power of the State to levy any tax. If, at any point of time between the arrival of the goods in port and their breakage from the original cases, or sale by the importer, they become subject to state taxation, the extent and the character of the tax are mere matters of legislative discretion."

In *Cook* v. *Pennsylvania* (*supra*), this Court said (p. 570):

"But it is argued that the authority of the auctioneer to make any sales is derived from the State, and that the State can, therefore, impose upon him a tax for the privilege conferred, and that the mode adopted by the statute of measuring that tax is within the power of the State. That being a tax on him for the right or privilege to sell at auction, it is not a tax on the article sold, but the amount of the sales made by him is made the measure of the tax on that privilege. In support of this view,

it is said that the importer could himself have made sale of his goods without subjecting the sale to the tax. The argument is fallacious, because, without an auctioneer's license, he could not have sold at auction even his own goods. If he had procured or could have procured a license, he would then have been subject by the statute to the tax, for it makes no exception. By the express language of the statute, the auctioneer is to collect this tax and pay it into the Treasury. From whom is he to collect it if not from the owner of the goods? If the tax was intended to be levied on the auctioneer, he would not have been required first to collect it and then pay it over. It was, then, a tax on the privilege of selling foreign goods at auction, for such goods could only be sold at auction by paying the tax on the amount of the sales.

"The question as thus stated has long ago and frequently been decided by this court."

The Court then referred to the *Passenger Cases* (7 How. 283), *Crandall* v. *Nevada* (6 Wall. 35), *Case of the State Freight Tax* (15 Wall. 232), *Henderson* v. *The Mayor* (92 U. S. 259), *Welton* v. *Missouri* (91 U. S. 275), and *Waring* v. *The Mayor* (8 Wall. 110), and added (p. 573):

"The tax on sales made by an auctioneer is a tax on the goods sold, within the terms of this last decision and, indeed, within all the cases cited; and when applied to foreign goods sold in the original packages of the importer, before they have become incorporated into the general

property of the country, the law imposing such tax is void as laying a duty on imports."

In *Webber* v. *Virginia* (*supra*), this Court said (p. 350):

"* * * It matters not whether the tax be laid directly upon the articles sold or in the form of licenses for their sale. If by reason of their foreign character the State can impose a tax upon them, or upon the person through whom the sales are effected, the amount of the tax will be a matter resting in her discretion. She may place the tax at so high a figure as to exclude the introduction of the foreign article, and prevent competition with the home product. It was against legislation of this discriminating kind that the framers of the Constitution intended to guard, when they vested in Congress the power to regulate commerce among the several States."

(*b*) A tax on income is a tax on the source from which the income is derived.

It is well settled by the decisions that a tax on income is a tax on the source from which the income is derived, and that if the source be not subject to tax the income therefrom cannot be taxed. This principle is clearly stated in the final decision of the Pollock case at page 630 of 158 U. S.:

"We have unanimously held in this case that, so far as this law operates on the receipts from municipal bonds, it cannot be sustained, because it is a tax on the power of the states, and on their instrumentalities to borrow money,

and consequently repugnant to the Constitution. But if, as contended, the interest when received has become merely money in the recipient's pocket, and taxable as such without reference to the source from which it came, the question is immaterial whether it could have been originally taxed at all or not. This was admitted by the Attorney General with characteristic candor; and it follows that if the revenue derived from municipal bonds cannot be taxed because the source cannot be, *the same rule applies to revenue from any other source not subject to the tax;* and the lack of power to levy any but an apportioned tax on real and personal property equally exists as to the revenue therefrom." (The italics are ours.)

On the first hearing of this case the Attorney General sought to justify the assessment of the tax on the income from state and municipal securities "as part of the total income of the respective owners under a law assessing incomes generally and not discriminating between those securities and others of like character." But this Court, in its first as well as in its final decision, unanimously overthrew this contention. In the decision upon the first hearing (157 U. S. 429), the majority and the dissenting opinions agreed on this point and the principle was well stated in the dissenting opinion by Mr. Justice White, page 645, in these words:

> "In regard to the right to include in an income tax the interest upon the bonds of munic-

> ipal corporations, I think the decisions of this court, holding that the Federal government is without power to tax the agencies of the state government, embrace such bonds, and that this settled line of authority is conclusive upon my judgment here. It determines the question that *where there is no power to tax for any purpose whatever, no direct or indirect tax can be imposed.* The authorities cited in the opinion are decisive of this question." (The italics are ours.)

In the majority opinion the Court said (p. 581):

> "If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the Constitution, or of the rule of taxation and representation, so carefully recognized and guarded in favor of the citizens of each State. But constitutional provisions cannot be thus evaded. It is the substance and not the form which controls as has indeed been established by repeated decisions of this court."

In the same opinion the Court held that an annual tax upon the income from real estate is the same in substance as an annual tax on the real estate, and on this subject said (p. 580):

> "If the Constitution had provided that Congress should not levy any tax upon the real estate of any citizen of any State, could it be contended that Congress could put an annual tax for five or any other number of years upon the rent or income of the real estate?"

On the same subject the dissenting opinion by Mr. Justice White said (pp. 646, 647):

> "All these cases involved the question whether under the Constitution, if no power existed to tax at all, either directly or indirectly, an indirect tax would be unconstitutional. These cases would be apposite to this if Congress had no power to tax real estate. Were such the case, it might be that the imposition of an excise by Congress which reached real estate indirectly *would necessarily violate the Constitution, because as it had no power in the premises, every attempt to tax directly or indirectly would be null.* Here, on the contrary, it is not denied that the power to tax exists in Congress, but the question is, is the tax direct or indirect in the constitutional sense?" (The italics are ours.)

It was also held in the Pollock case that a tax on income from personal property is a tax on that property (158 U. S., 618).

The Pollock case shows clearly that where there is no power in Congress to tax the source of an income there is no power to tax the income—that there is no possible distinction between taxing an income and taxing the source from which it is derived. In the case at bar, the plaintiff is in just the same position, as to Federal income taxation, as a State official receiving a salary from his State or a recipient of income from State or municipal bonds. For example, the Governor of the State of New York may receive income from various sources, including his salary from the State.

As an individual he is taxable on all income received from taxable sources, whether rental from real estate or interest on bonds in general or otherwise, but he is not taxable as to his salary as Governor of the State or as to interest from any State or municipal bonds he may own. Likewise the plaintiff company in the case at bar is taxable as to all income received from taxable sources, but it is not taxable as to its income from exportation, because exportation is not taxable, being exempt in just the same way and to the same extent as the governmental agencies of the several States.

In the case of *Collector* v. *Day*, 11 Wallace, 113, the tax in dispute was upon the salary of a judicial officer of a State, under the Federal income-tax act of June 30, 1864, and the amending acts of 1865, 1866, and 1867. It was held that as the Government of the United States could not tax a State office, it could not tax the salary or income of a State officer.

In the case of *Dobbins* v. *Erie County Commissioners*, 16 Pet. 435, it was held that a tax levied in Pennsylvania upon the income of a Federal officer was a tax upon the Federal office or function and invalid.

(c) The tax on the income of plaintiff in error is, upon the foregoing principles and decisions, unconstitutional and void.

The income of the plaintiff, William E. Peck & Company, Inc., consists almost wholly of commissions or profits on sales of goods exported. Such income for the year 1914 consisted of the profits on a certain num-

ber of such sales. The income from a group of such sales is a collection of the incomes from single sales. In considering either single export sales or transactions, or groups of such sales, and the profit or income therefrom, it is clear that no distinction can be established between the taxation of such sale or transaction and the taxation of the income or profit therefrom. To tax the profit is really to tax the sale or exporting transaction. The profit is the net yield or proceeds of the transaction, and the most essential and necessary factor in it, in fact, its very object and purpose, for the sake of which the transaction is made and except for which in sufficient amount the transaction would not be made.

No distinction has been drawn, in the courts or in commercial life, between the taxation of a transaction and the taxation of the proceeds of it. An exporter will sell a certain number of articles abroad, using a bill of lading, and receiving the proceeds of the sale by a bill of exchange. It has been settled that a tax on the bill of lading (and inferentially on the bill of exchange, *Fairbank* v. *United States*, *supra*), is a tax on the exported goods or the exporting transaction. As the bill of exchange is drawn for the amount of the invoice, which amount includes the profit, a tax on the bill of exchange necessarily includes a tax on the profit or income. There is no difference in substance and effect between a tax on the goods in course of exportation, or on the bill of lading, or on the bill of exchange, or on the commission or profit of the sale. All are alike burdens on the export transaction, and this is the

essential matter. Differences in rate or method of application are of no significance.

If it were held that a tax on income from exports is not a tax on exports, the result would be to open the way to serious injury or destruction of export trade by taxation, which would in effect overthrow the Constitutional prohibition against taxing exports. For if it be not taxing exports to tax the income from exports at the rate of one per centum, it would not be taxing exports to tax such incomes at the rate of five, ten, thirty or fifty per centum. But it is indisputable that to tax income from exports at such high rates would be to effectively cripple and perhaps destroy entirely the export trade of the country and to do it by taxation, although the meaning and purpose of Clause 5 in Section 9 of Article I of the Constitution is admittedly to prevent taxes on exports. In other words, the export trade could be crippled or destroyed by taxation but exports would not be taxed—a palpable absurdity.

In view of the history of income taxes in this and other countries, it is to be expected that the rates of such taxation in this country will be increased to large percentages. In fact, very heavy rates of income tax are apparently now at hand. The revenue bill passed by the House of Representatives on May 23, 1917 (65th Congress, 1st Session, H. R. 4280; Congressional Record, Vol. 55, No. 44, p. 3004) included provisions imposing taxes on the net incomes of individuals at rates ranging progressively, according to the amount of the total net income, from one per centum

to forty-five per centum; and on the net incomes or profits of corporations, in excess of certain exempted amounts, at the rate of eight per centum; these taxes to be in addition to taxes on incomes under existing laws, in which is included a tax of eight per centum on so-called "excess" profits of corporations. This revenue bill, as amended by the Committee on Finance of the United States Senate and reported by this Committee to the Senate, provided for substantially higher rates on the net incomes of corporations, partnerships and individuals in excess of certain exempted amounts (on excess profits, so-called); and on September 5, 1917, the Senate, in Committee of the Whole, voted by a large majority (7[illegible] for, 7 against) for the provisions recommended by the Committee, imposing graduated rates ranging from twelve per centum to sixty per centum on such net incomes above $5,000 per annum and in excess of the exemptions permitted, which exemptions, based upon the average earnings of certain former years, cannot be less than six per centum nor more than ten per centum of the actual invested capital. On August 24, 1917, it was voted by the Senate (Congressional Record, Vol. 55, No. 119, p. 6915) that the rate of normal income tax on the net incomes of corporations should be six per centum, to which the above-mentioned excess profits taxes are to be added.

The income tax is now a favorite form of taxation, affording easy opportunity for discrimination between subjects of taxation, and classes of income. But the matter here considered relates entirely to the question

of power in Congress and not to the probable use of such power. The single question here considered is whether a tax on incomes from exports is a tax on exports. If it is not, and if, therefore, Congress has power to tax such incomes at the rate of one per centum, it has the power to tax them at the rate of fifty per centum or more, so far as this question is concerned. "The power to tax is the power to destroy." If Congress has power to tax the income or profit of export transactions it has power to destroy such income or profit. In fact, export trade can be more readily destroyed by taxing its profits than by placing taxes directly on the goods themselves or on the documents representing the goods. Taxes in the latter form are easily added to the selling prices of the goods and thus shifted to the foreign purchasers, but taxes on net profits are not so readily shifted and strike more effectually at the life of the trade, as they can drive men out of the trade.

Congress has power to and does discriminate in the income tax between different kinds of occupations and conditions, exempting charitable, religious, labor and agricultural organizations and taxing others; and imposing upon certain classes of income-tax payers higher rates than are imposed on other classes, as, for example, under the act of October 3, 1913 (*supra*), recipients of incomes of $20,000 or more per year were required to pay, in addition to the normal rate, an extra or additional rate called the surtax, and under the present law there are instances too numerous to men-

tion. The requirement of uniformity is held by the Court to be sufficiently met when all the members of any designated class are treated alike throughout the United States. Likewise, Congress has power to and does discriminate between commodities in imposing taxes, as in the internal-revenue taxes on oleomargarine, tobacco and liquors, and in many items of import duties. And so, if it were held that a tax on incomes from exports is not a tax on exports, Congress could readily at any time impose higher than the normal or ordinary rates on incomes of exporters or certain classes of exporters. An example of such discrimination appears in the act under consideration in the Fairbank case (*supra*), and a quotation from the opinion of the Court, on page 290, calls attention to it:

> "It must be noticed that by this Act of 1898 while a variety of stamp taxes are imposed, a discrimination is made between the tax imposed upon an ordinary internal bill of lading and that upon one having respect solely to matters of export. An ordinary bill of lading is charged one cent; an export bill of lading ten cents. So it is insisted that there was not simply an effort to place a stamp duty on all documents of a similar nature but by virtue of the difference an attempt to burden exports with a discriminating and excessive tax."

It is well settled that Congress can make practically any discrimination between classes, according to its discretion, provided that there is no distinction be-

tween members in the same class. Under this power and in its discretion Congress has imposed taxes for the purpose of discouraging conditions or enterprises not favored in the legislative viewpoint. If it were held that incomes derived from export trade may be taxed, it would be possible for Congress, with the view of increasing the employment of labor in the manufacturing industries or affecting available domestic supplies and prices, to impose an especially heavy tax on incomes derived from the exportation of certain kinds of materials. For example, for the purpose of relieving actual or supposed scarcity and affecting domestic prices, Congress could impose a special tax on incomes or profits derived from exportation of gasoline or other necessary fuels, or from the exportation of copper or other metals; or, for the purpose of increasing the manufacture of cotton cloth in the United States, Congress could impose a heavy tax on incomes or profits derived from exports of raw cotton. Almost any line of export commerce could thus be made the subject of repressive taxation. Moreover, the requirement of uniformity would not be violated if Congress should tax incomes derived from the export sales of certain articles while exempting entirely incomes derived from sales of like articles for domestic consumption. The result, therefore, of such a decision concerning incomes from exports would be the practical elimination of the constitutional prohibition against taxing exports, and the opening of the way to extensive, discriminating and de-

structive taxation of export commerce, which the prohibition was intended to make impossible.

It cannot be supposed that this Court will now, in dealing with the tax on income from exports, depart from the principle established with the beginning of the Federal Government and constantly maintained to the present day, that it is the substance and effect of a tax, and not its form or name, which determinates its legality or illegality. This principle has been steadily applied by this Court to taxes on income as well as to all other kinds of taxes, and has been followed by the judiciary of the various States. Institutions, investments, enterprises, extensive and various, affecting the welfare and happiness of millions of our people, have been established and maintained in reliance upon the principle that the constitutional guarantees affecting taxation cannot be evaded by indirection.

If this principle were overthrown as to income taxes, which have now become established as a permanent and favorite method of taxation, the effect would be incalculable. If it were declared that a tax on income from exports is not a tax upon exports, its source, it would be recognized at once that the export trade could be taxed by this method at the discretion of Congress, and agitations would spring up for heavy taxation of many articles now exported in large quantities and hence produced in large quantities in various sections of the country. The fear, prospect, or reality of such taxation would discourage and destroy enter-

prises for such exportation, and for other exportation which could be similarly attacked, and also for the production which supplies the material of exportation; and the result would be industrial, commercial and financial distress affecting great numbers of our people engaged or employed in agriculture, mining, manufactures, transportation, and merchandising.

The constitutional protection from Federal taxation of the instrumentalities of the States being no more binding and sacred than that accorded exports, it would, in that event, logically follow that in the same way a tax on income from State and municipal bonds would not be a tax on the bonds, the source of the income, and that such securities could, therefore, be taxed by the income-tax method at the discretion of Congress; also that the income from bonds of the United States could be taxed by the States by means of State income-tax laws, which are becoming more numerous. Investments amounting to many millions of dollars have been made in such public securities by individuals and estates, and by great banking, trust and insurance institutions, sustaining fiduciary relations of the most delicate character and involving the savings and maintenance of great numbers of our people; and these investments in such securities have been made at prices and upon conditions determined by the constitutional exemption from taxation in any form. The prospect or reality of taxes on income from such securities, which if possible at all could be at substantial rates, would considerably lower the prices of such securities in the

investment market and would thereby reduce the available total of reserve and other funds invested in them, thus affecting the resources for meeting the obligations of such institutions, impairing their public and banking credit and the confidence of the public in their stability, and thus probably resulting in the financial collapse of many such institutions, with widespread distress and ruin among the people.

It would also, in the event of such a decision, logically follow that in the same way the States could impose taxes by the income-tax method on incomes and profits from interstate commerce and from foreign commerce, both imports and exports; and thus the constitutional power of Congress over interstate and foreign commerce would be seriously impaired, leaving the way open to discriminations by States against the commerce of other States and against import or export commerce, which would unquestionably lead to nearly all of the ills for the prevention of which the regulation of interstate commerce was given to Congress, including such a disturbance of harmony among the States as to possibly even threaten the integrity of the Union. The States could also, upon the basis of such a decision as is here, for the moment only, imagined, tax the incomes of United States judges and officers, and the United States Congress could tax the incomes of State, county, and municipal judges and officers, and in this way also the harmony and balance between State and Federal powers, upon which the Constitution rests, would be threatened and disturbed.

FIFTH.

The exemption from taxation of income derived from exports is based upon sound economic and national principles.

The provision in the Constitution of the United States (Article I, Section 9, Clause 5) that Congress shall not tax exports has been often reviewed by this Court, which has declared that the meaning and purpose of the provision is the prohibition of any tax of any kind on exportation. In *Fairbank* v. *United States* (*supra*) the Court said of this matter (p. 290):

> "Whether such provision is or is not wise is a question of policy with which the courts have nothing to do. We know historically that it was one of the compromises which entered into and made possible the adoption of the Constitution."

We know that at the time of the adoption of the Constitution the States insisted upon the provision as a permanent guarantee against any taxation of their export commerce, and that they were well aware that this freedom of their export trade was fundamentally necessary to their economic life. The economic life of a state must be the basis and support of its political life, and hence the express constitutional provision that exports must be free from tax is fully as important with regard to the sovereignty of the States as the implied constitutional provision that State and munici-

pal securities must be free from tax. It is the economic life which creates the taxable values on which the public securities rest.

The maintenance of our national system of tax-free exports on grounds of public policy is well illustrated by our internal-revenue laws which provide that distilled spirits, tobacco, oleomargarine, proprietary medicinal articles, playing cards and other articles may be withdrawn from bonded warehouses or manufactories for export without payment of the taxes imposed on like articles produced and consumed in this country; and also by the drawback laws, which provide that on the exportation of liquors, tobacco, etc., on which internal-revenue taxes have been paid there shall be a drawback or refund of such taxes, and that on the exportation of articles manufactured from imported materials on which import duties have been paid there shall be allowed a drawback of such duties.

The provisions of the internal-revenue laws referred to constitute an exemption of exports from the taxation imposed by these laws on domestic manufactures; and the drawback provisions of the tariff law have the effect of making imports practically exempt from taxation when they enter into and become a part of the exports of the country. This long-continued system of refunds in connection with the liquor and tobacco taxes, and with the import duties, the oldest important parts of Federal taxation, is not compelled by constitutional requirement but is based on the public policy of avoiding taxes which would have the effect of burdening ex-

ports. Moreover, our customs laws provide that goods imported may be placed in bonded warehouses without payment of duty, and may thereafter be withdrawn free of duty for exportation, whether because no market is found for such goods in this country or for other reason.

Among the substantial reasons for the exemption of our exports from taxation in our country is the taxation which such exports must endure in the foreign countries to which they go. Double taxation is greatly condemned by public sentiment as unjust and destructive, and the taxation of exports would involve double taxation, for the exports are carried to foreign countries where they are almost universally subjected to heavy taxation as imports and are also, for the most part, taxed further in such countries as a part of the wealth therein, and the incomes earned in handling and trading in our exports are also heavily taxed abroad.

It is well known that, for the purpose of developing an export trade in cotton, metals, and a variety of articles produced here abundantly, American concerns have at great labor and expense established branch houses and agencies abroad, whose work is solely that of obtaining and keeping foreign markets for American goods. The investments in this necessary work, with the incomes and profits earned in such agencies, are taxed abroad and for the most part very heavily. They are doubly taxed when our country taxes incomes derived from exports. The foreign taxes on the earnings of our export commerce have been greatly increased

during the past few years, and the foreign import duties on goods exported from this country are to be made higher after the great war is over. A number of these foreign tariffs will be admittedly hostile, intended to put especial burdens on our exported goods.

Another reason for the exemption of exports from taxation is that export trade involves extraordinary risks and burdens in the enterprise itself. Commodities sold in domestic trade have the advantage of entering at once into all the opportunities of the largest and richest market in the world, where the trade enjoys all the protection which our government and institutions give to industry and commerce, and all the benefit from the conditions which give to our people a higher standard of living. The export trade, on the contrary, must make its way beyond the borders of the country, often into the outposts of civilization and through great distances; must take its chances under the institutions and conditions in foreign countries; and must overcome obstacles unknown in domestic trade, including hostile tariffs and foreign export bounties, and must meet the most severe competition that the world can furnish, often made more difficult by combinations among foreign producers such as are forbidden to our people under our laws.

At the present time, the disadvantages of American exporters in the foreign trade are officially recognized. The United States Government, through the Federal Trade Commission, and with the approval of the President, has urged the enactment of a statute providing

for exemption for American exporters from the application in the foreign trade of the provisions of our anti-trust laws. In the language of the Commission, this measure to relieve our export trade from the operation of our laws affecting trusts and combinations is recommended for the purpose of "enabling American exporters to meet foreign competitors on more nearly equal terms in international commerce." A bill to carry this purpose into effect (65th Congress, 1st Session, H. R. 2316) passed the House of Representatives on June 13, 1917 (Congressional Record, Vol. 55, No. 61, p. 3860), and was favorably reported to the United States Senate by the Senate Committee on Interstate Commerce on August 20, 1917 (Congressional Record, Vol. 55, No. 115, p. 6751). The Federal Trade Commission also says in its report on this subject (Report on Co-operation in American Export Trade, June 30, 1916, Part I, p. 3):

> "While the United States has been absorbed in domestic development other nations have followed definite policies for the expansion of their foreign trade and have perfected efficient means for the purpose in view.
>
> Recognizing the vital influence of transportation facilities, foreign nations have built up their ocean shipping, have granted low export railway rates, and have combined their land and ocean transportation facilities to give their shippers ready entrance into over-seas markets. The United States, on the contrary, has neglected its merchant marine until it is dependent upon its commercial rivals to deliver its

goods. In consequence the transportation of its products is now largely controlled by powerful international combinations of foreign shipowners, who discriminate against American shippers."

It should not be forgotten that our American exporters are pioneers of trade in foreign lands, who have by great efforts cleared away many obstacles and opened up channels of commerce from American enterprises to foreign peoples. By establishing such channels the exporters increase the output of our industries, giving additional employment to our people and bringing additional wealth into our country in payment for the goods sent out. By increasing the output of American industries they aid in lowering the cost of production per unit and thus confer an economic benefit on all consumers. The maintenance and development of exports adds to domestic incomes and the amount of taxable property all over the country. It is well recognized that our national system of tax-free exports has played a large part in the extraordinary progress of our country and its magnificent development in industry and prosperity.

However, the part that has been played by our export trade in creating these great national advantages is not clearly understood by the masses of our people, especially throughout the interior of the country. While the output of our fields and factories is in evidence, and also the returns brought to labor and capital by such output, the fact that they would not be as

great as they are without our export trade is not well realized by the people generally. Hence there arise at times popular impulses which demand the restriction of exports by repressive taxation. If such impulses could obtain what they seek, lasting injury would be brought upon the prosperity and industrial progress of the country. It must be remembered that, under our system of government, if export trade could be taxed at all, it could be taxed at discriminating and much higher rates than corresponding domestic business; in fact, it could be taxed heavily while the corresponding domestic business could be left untaxed; and thus the export trade could be crippled or destroyed through heedless prejudice. If profits of exportation could be taxed legally, they could be taxed at such high rates as to drive exporters out of business and thus strike at the very life of the trade. It was to guard against such dangers that the constitutional provision was adopted.

The available governmental revenues of our country are increased rather than diminished by the exemption of exports, through the increased wealth of the country which results from it. No other constitutional exemption from taxation has such substantial considerations of public welfare to support it, for none of them encourage enterprise or production which adds to the general welfare. With the proceeds of export trade operations untaxed when received, they are left in full as working capital for new export ventures, which bring in new wealth, or else such proceeds are at once added in full

to the national resources from which all local and national taxes are paid; they add to the number of domestic incomes subject to the higher rates of the surtax; and they add to the general property values which increase the revenue from local and national taxation.

SIXTH.

The opinion of the District Court.

The essence of the opinion of the District Court on the merits against the plaintiff in error is that "profits or income from exports should be taxable because subsequent to the act of export."

This does not touch the vital points of the case. The opinion of the lower court refers to *Cornell* v. *Coyne*, 192 U. S. 418, but this case relates entirely to a tax on the manufacture or production of an article entirely independent of its subsequent sale or exportation, and has no bearing upon a tax on income from exports.

This proposition of the District Court is effectually disposed of by the reasoning of this Court in *Brown* v. *Maryland*, 12 Wheat. 419, in answer to the contention that the tax there in question (a license tax on importers) was imposed "upon the trade and occupation of selling foreign goods by wholesale after they have

been imported." The Court, speaking by Chief Justice Marshall said (p. 445):

> " In support of the argument, that the prohibition ceases the instant that the goods are brought into the country, a comparison has been drawn between the opposite words export and import. As, to export, it is said, means only to carry goods out of the country, so, to import, means only to bring them into it. But, suppose we extend this comparison to the two prohibitions. The states are forbidden to lay a duty on exports, and the United States are forbidden to lay a tax or duty on articles exported from any state. There is some diversity in language, but none is perceivable in the act which is prohibited. The United States have the same right to tax occupations which is possessed by the states. *Now, suppose the United States should require every exporter to take out a license, for which he should pay such tax as Congress might think proper to impose; would government be permitted to shield itself from the just censure to which this attempt to evade the prohibitions of the Constitution would expose it, by saying that this was a tax on the person, not on the article, and that the legislature had a right to tax occupations? Or, suppose revenue cutters were to be stationed off the coast for the purpose of levying a duty on all merchandise found in vessels which were leaving the United States for foreign countries; would it be received as an excuse for this outrage, were the government to say that exportation meant no more than carrying goods out of the country, and as the*

prohibition to lay a tax on imports, or things imported, ceased the instant they were brought into the country, so the prohibition to tax articles exported ceased when they were carried out of the country?" (The italics are ours.)

Similar reasoning was used by this Court in *Selliger* v. *Kentucky*, 213 U. S. 200. The case concerned the taxation by the State of Kentucky of German warehouse receipts for certain barrels of whisky, valued at the value of the whisky they represented, where admittedly the State could not tax the whisky itself, either because it was exported from the United States or because of its *situs* abroad. The attorneys for the State, in support of the tax and the decision of the court of appeals sustaining it, said in their argument (p. 201):

> "The tax sought to be imposed is not a tax imposed by Kentucky upon the whisky as a foreign product, nor a tax imposed by reason of the whisky being exported, nor a tax while it is in a state of transit to some other place of destination. It is sought to be imposed upon the whisky after its exportation, and after it has reached its storage destination, and has become property in the market at its place of destination."

This contention was overruled by this Court, which said in its opinion (p. 207):

> "The tax is imposed on the theory that the receipts are the equivalents of the goods, and

> are taxable on that footing, although the goods cannot be taxed. Assuming, as the Court of Appeals assumed, that the whisky is exempt under the Constitution of the United States, we are of the opinion that the protection of the Constitution extends to warehouse receipts locally present within the state. What was said by Chief Justice Taney about bills of lading applies to them, *mutatis mutandis:* 'A duty upon that is, in substance and effect, a duty on the article exported.' *Almy* v. *California*, 24 How. 169, 16 L. ed. 644; *Fairbank* v. *United States*, 181 U. S. 283, 294, 45 L. ed. 862, 21 Sup. Ct. Rep. 648."

The contention of the District Court that the completion of the act of exportation permits taxation of its proceeds is again effectually answered by this Court in *Philadelphia & Southern S. S. Co.* v. *Pennsylvania* (*supra*), wherein the Court held that a tax imposed under a law of Pennsylvania on the gross receipts of a steamship company derived from transportation in interstate and foreign commerce was a tax on such commerce and invalid. Under the terms of the State law in question, returns of the gross receipts were required to be made every six months to the Auditor-General of the State, upon which the tax was assessed by him and charged against the company. The Court said (p. 342):

> "If such a tax is laid, and the receipts taxed are those derived from transporting goods and

passengers in the way of interstate or foreign commerce, *no matter when the tax is exacted, whether at the time of realizing the receipts, or at the end of every six months or a year, it is an exaction aimed at the commerce itself, and is a burden upon it, and seriously affects it.*" (The italics are ours.)

The acceptance of the assumption by the District Court that "profits or income from exports should be taxable, because subsequent to the act of export", would have the effect of destroying the constitutional prohibition against taxing exports. If the completion of the act of exportation gives Congress the power to tax its proceeds or avails, it must likewise give Congress power to impose a tax directly on the articles exported, which could readily be done by assessments made each year and based upon schedules or returns of goods which had been exported, Moreover, the reasoning in question could not be limited in its application to the exemption of exports, but could with equal propriety be applied to any other constitutional or to any statutory exemption from taxation, to nullify such exemption; to permit, for example, the taxation of income from the interest upon the obligations of States and their political subdivisions and upon United States obligations, and of the income of State officers and employees; and also to permit the taxation by the States of income of Federal officers and judges and uncontrolled State taxation of receipts or profits from interstate commerce.

In Conclusion.

Briefly the plaintiff in error contends that the Constitution prohibits the laying of any governmental burden upon exports, and that this prohibition is unaffected by the Sixteenth Amendment; that the Income Tax provision of the Act of 1913 provides for an income tax pure and simple; that the levy of such a tax under that law upon the income of the plaintiff in error, derived exclusively from foreign exportation, is a tax upon exports, for the reason that the income is the avails and most essential element of exporting, and that a burden upon it is a burden upon exporting, and is, therefore, unconstitutional and void. The plaintiff also contends that if the tax in question can be considered as an excise tax on the business of exporting it is void under the decisions in *Brown* v. *Maryland* (*supra*), the Pollock case (*supra*), and other leading cases.

The judgment of the District Court should be reversed, with direction to enter judgment in favor of the plaintiff in error, in accordance with the demand of its complaint and the testimony.

Respectfully submitted,

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Counsel.

[8455-Z]

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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1917.

No. 234.

WILLIAM E. PECK & COMPANY, INCORPORATED,
Plaintiff in Error,

vs.

JOHN Z. LOWE, JR., Collector of Internal Revenue, Second District of New York,
Defendant in Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

In its Statement of the Case (Brief, p. 4) the Government says:

> "It indisputably appears that the foreign business of the plaintiff in error was not one of direct exportation, but consisted of selling 'over there' what had been by it actually purchased here."

We are at a loss to know what is meant by this, as no point is made of it in the argument which follows. But whatever was intended, the statement, we submit, is "indisputably" erroneous.

The character of the plaintiff's business was testified to by its Treasurer Harry R. Hillard. He said (Record, p. 36, line 106) that the business of the plaintiff was exporting; that its business was to secure in foreign countries through agents and representatives orders for American goods; that these orders were placed with the manufacturers and the goods shipped direct to the steamer carrying them abroad; that the plaintiff paid for the goods here and made its collections from its customers in foreign countries reimburse it.

The following then occurred:

> "Q. (By the Judge.) Then, apparently, your income is derived from buying at one price in the United States, and sending the goods so bought abroad, and charging your customers a higher price than you yourself pay?
>
> A. That is it.
>
> Q. You are responsible to the manufacturers or people in the United States from whom you buy?
>
> A. We are.
>
> Q. And your money is collected from the persons or customers in foreign countries?
>
> A. Yes; the risk is entirely ours.
>
> Q. So far as the foreign customer is concerned, you are the vendor?
>
> A. Yes."

If buying and paying for goods here, *sending them abroad and selling them there*—all on one's own account and at one's own risk—does not constitute exportation, we fail to understand the meaning of that term.

The Government in its brief of argument makes two points:

1. That the tax in question is levied upon the receipts from exportation after the process of exportation has been completed and such receipts have become a part of the general property of the taxpayer, and that, therefore, such receipts are taxable upon the principle applied in *Cornell* v. *Coyne*, 192 U. S. 418; *Brown* v. *Houston*, 114 U. S. 622, and *Turpin* v. *Burgess*, 117 U. S. 504.

2. That the tax is to be regarded as an excise levied upon the person of the taxpayer, measured by the amount of his income from all sources, and that the fact that a portion of such income is derived from the business of exportation is to be disregarded under the rule applied in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107.

I.

As to the first point:

It is not denied that income from exportation after it has been received and become commingled with the general property of the taxpayer is liable to the imposition of a general property tax, either Federal or State,

or both. So also is the income from State and Federal bonds, the salary of State and Federal officials and the receipts from interstate commerce.

It is one thing, however, to tax property which, although derived as income from a non-taxable source, has become an indistinguishable part of the taxpayer's general funds, and quite a different thing to tax a person on account of his receipt of an income from such source. The former casts no direct or measurable burden upon the exempted office, property or occupation, because the income has been separated therefrom and no longer has any connection therewith; while the latter directly burdens such office, property or occupation, because to tax income as such is the same in substance and effect as to tax the source from which it is derived.

The difference between the two classes of taxes was pointed out by Mr. Justice Bradley in *Philadelphia and Southern Steamship Co.* v. *Pennsylvania*, 122 U. S. 326, 341.

Of the latter class were the taxes overthrown in

Weston v. *Charleston*, 2 Pet. 449;
Dobbins v. *The Commissioners of Erie County*, 16 Pet. 435;
Collector v. *Day*, 11 Wall. 113;
Philadelphia and Southern Steamship Co. v. *Pennsylvania*, 122 U. S. 326;
Pollock v. *Farmers' Loan & Trust Co.*, 157 U. S. 429.

Thus, in *Weston* v. *Charleston* it was held that an income tax imposed on the income of United States

securities was a tax on the securities themselves, and equally inadmissible. (See the explanation of this case in *Fairbank* v. *The United States*, 181 U. S., at p. 296.)

In *Dobbins* v. *The Commissioners of Erie County* it was held that a State cannot tax an officer of the United States on account of the emoluments of his office, because to do so is to tax the office.

In *Collector* v. *Day* the court had up for consideration the validity of a tax imposed under the Federal income tax act of 1864 and its amendments, upon one J. B. Day, on account of his salary as a Judge of the Court of Probate and Insolvency of the State of Massachusetts. It was held that as the Government of the United States cannot tax a State office, it cannot tax the salary or income of the incumbent of such office, because the one is the equivalent of the other.

In *Philadelphia and Southern Steamship Co.* v. *Pennsylvania* it was held that a tax upon gross receipts derived from interstate and foreign transportation is a tax upon such transportation, and that:

> "no matter when the tax is exacted, whether at the time of realizing the receipts, or at the end of every six months or a year, it is an exaction aimed at the commerce itself and is a burden upon it, and seriously affects it" (p. 342).

In *Pollock* v. *Farmers' Loan & Trust Co.* it was unanimously held that a tax upon income levied under

the income tax act of 1894 derived from the interest of bonds issued by a municipal corporation is a tax upon the power of the state and its instrumentalities to borrow money and is consequently repugnant to the Constitution of the United States. It was also held that a tax on the income derived from real and personal property was a tax on such property, the justices differing only as to whether the tax was direct or indirect.

It will be observed that in three of the above cases the tax was imposed under general income tax acts, two of which were similar in their provisions to the act under which the present tax was imposed, and that in all of them the income had been received and had become as much a part of the general property of the taxpayer as the income taxed in the present case.

If the income from State and Federal securities and from State and Federal offices cannot be taxed, how can the income from exports be taxed? And, conversely, if the income from exports can be taxed, how can the income from State and Federal securities and offices escape? The Constitution protects only the source in any case, and if income is included in such protection in one case, it must be in all.

Answering the argument that the constitutional prohibition against the taxation of exports was designed to give immunity from taxation only to property that is in the actual course of exportation, Mr. Justice

Hughes, in *United States* v. *Hvoslef*, 237 U. S. 1, at page 13 said:

> "This constitutional freedom, however, plainly involves more than mere exemption from taxes or duties which are laid specifically upon the goods themselves. If it meant no more than that, the obstructions to exportation which it was the purpose to prevent could readily be set up by legislation nominally conforming to the constitutional restriction but in effect overriding it. It was the clear intention of the framers of the Constitution that 'the process of exporting the products of a State, the goods, chattels, and property of the people of the several states, should not be obstructed or hindered by any burden of taxation.'"

In *Philadelphia and Southern Steamship Co.* v. *Pennsylvania*, 122 U. S. 326, Mr. Justice Bradley at page 338, said:

> "Of what use would it be to the ship-owner, in carrying on interstate and foreign commerce, to have the right of transporting persons and goods free from state interference, if he had not the equal right to charge for such transportation without such interference? The very object of his engaging in transportation is to receive pay for it. * * * To apply the language of Chief Justice Marshall, fares and freights for transportation in carrying on interstate or foreign commerce are as much essential ingredients of that commerce as transportation itself."

In *Leloup* v. *Port of Mobile*, 127 U. S. 640, Mr. Justice Bradley, at page 648, said:

> "A great number and variety of cases, involving the commercial power of Congress, have been brought to the attention of this court during the past fifteen years which have frequently made it necessary to re-examine the whole subject with care; and the result has sometimes been that in order to give full and fair effect to the different clauses of the Constitution, the court has felt constrained to recur to the fundamental principles stated and illustrated with so much clearness and force by Chief Justice Marshall and other members of the court in former times, and to modify in some degree certain dicta and decisions that have occasionally been made in the intervening period. This is always done, however, with great caution, and an anxious desire to place the final conclusion reached upon the fairest and most just construction of the Constitution in all its parts.
>
> "In our opinion such a construction of the Constitution leads to the conclusion that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress. This is the result of so many recent cases that citation is hardly necessary."

In the *Hvoslef* case, Mr. Justice Hughes, after referring to these cases, declared that they have become one of the commonplaces of constitutional law, and added:

> "We know of no ground upon which a different effect can be given to the explicit constitutional provision which denies to Congress the right to tax exportation from the States."

As to the cases of *Cornell* v. *Coyne*, 192 U. S. 418; *Brown* v. *Houston*, 114 U. S. 622; *Turpin* v. *Burgess*, 117 U. S. 504, and *State Tax on Railway Gross Receipts*, 15 Wall. 284, cited by the Government, it is enough to say:

(1) That the last named was unanimously overruled in *Philadelphia and Southern Steamship Co.* v. *Pennsylvania* (*supra*).

(2) That the other three are clearly distinguishable from the present case and the cases cited above, and were decided by applying the principle upon which taxes of the first class above mentioned are upheld. In each of them the tax was a general property tax and was levied upon manufactured goods before they became the subject of exportation. In the *Cornell* case, after reviewing the other two cases, the court adopted the principle declared in the *E. C. Knight Co.* case that "commerce succeeds to manufacture and is not a part of it". The court's conclusion was as follows:

> "The true construction of the constitutional provision is that no burden by way of tax or

duty can be cast upon the exportation of articles, and does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated."

The difference between the present case and the *Cornell* case and the similar cases which preceded it, is that in the latter the tax did not touch the exportation, while here it rests directly upon it, being specifically based upon the income derived therefrom. If there is no income there is no tax and the tax increases or decreases automatically with the increase or decrease of the income on account or by reason of which it is imposed.

II.

As to the Government's second point, namely: that the tax is to be regarded as an excise levied upon the person of the taxpayer, measured by the amount of his income from all sources, and that the fact that a portion of such income is derived from the business of exportation is to be disregarded under the rule applied in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107.

The *Flint* case decides nothing more than that "when the sovereign authority has exercised the right to tax a legitimate subject of taxation, as an exercise of a franchise or privilege, it is no objection that a measure of taxation is found in the income produced

in part from property which of itself considered is non-taxable".

That the present case does not come within the principle of the *Flint* case is, we think, entirely clear.

Of course the exercise of the franchise or privilege of exporting—that is, the occupation of the exporter—is not a legitimate subject of taxation whether the business be carried on by a corporation, a copartnership or an individual. This was pointed out by Chief Justice Marshall in *Brown* v. *Maryland*, and again by Mr. Justice Bradley in *Philadelphia and Southern Steamship Co.* v. *Pennsylvania*, 122 U. S. at pages 342, 343.

The Government, however, does not claim that the tax in question is a privilege or occupation tax, but insists that it is an excise upon the *person* of the taxpayer, measured by his income from all sources without regard to his occupation or the source of his income.

We had supposed that an excise was a tax upon privileges and occupations, or at most upon the income derived from gainful pursuits or profitable investments. A tax upon persons generally, without regard to their occupations, would seem to partake of the nature of a capitation tax rather than an excise, and so would need to be apportioned. If such a tax could be classed as an excise upon persons and thus brought within the principle of the *Flint* case, it is difficult to see what would be left of the constitutional exemption of exports or of any other property. Apparently such a

classification, with such an application of the *Flint* case, would open the door to the taxation of everything from the salary of a State official to the income from a tax exempt Government bond.

We submit that Constitutional guaranties are not to be frittered away by any such reasoning.

A similar argument was presented in *Brown* v. *Maryland*. It was there insisted that if a duty on an article imported would be repugnant to the Constitution, the tax then under review should be regarded not as a tax upon the article imported but on the person of the importer. To this Chief Justice Marshall replied:

> "It is impossible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition which is general as if it were confined to a particular mode of doing the forbidden thing. * * * Suppose the United States should require every exporter to take out a license, for which he should pay such a tax as congress might think proper to impose; would government be permitted to shield itself from the just censure to which this attempt to evade the prohibitions of the constitution would expose it, by saying that this was a tax on the person, not on the article, and that the legislature had a right to tax occupations?"

In *Dobbins* v. *The Commissioners of Erie County* (*supra*) it was said:

> "It will not do to say, as was said in argument, that although the language of the act may

> import that offices and posts of profit were taxable, that it was the citizen who holds the office whom the law intended to tax, and that it was a burden he was bound to bear in return for the privileges enjoyed, and the protection received from government; and, then, that the liability to pay the tax was a personal charge, because the person upon whom it was assessed was a taxable person."

In *Cook* v. *Pennsylvania*, 97 U. S. 566, it was claimed that a tax upon an auctioneer, measured by the amount of his sales, was a tax upon the person of the auctioneer, and not upon the goods sold, but the court declared the argument to be fallacious.

To the same effect is *Leloup* v. *Port of Mobile* (*supra*).

In *State* v. *Allgeyer*, 110 La. 839, the tax was in terms upon the person of the exporter. The court said:

> "Defendants clearly are merely exporters, and it is well settled that a tax upon an importer or exporter is an impost or duty upon imports or exports within the meaning of the prohibition of the constitution of the United States against the laying of imposts by the states."

The governing principle is declared in *Fairbank* v. *The United States*, 181 U. S. 283, in the following language:

> "The freedom of exportation being guaranteed by the constitution it cannot be disturbed

by any form of legislation which burdens tha
exportation. The form in which the burden i
imposed cannot vary the substance."

That mere names, forms or classifications cannot b
employed to override constitutional limitations,
further shown by the explanation of the decision in th
Pollock case to be found in the *Brushaber* case. It
there said:

"The conclusion reached in the *Pollock* cas
did not in any degree involve holding that i
come taxes generically and necessarily can
within the class of direct taxes on property, b
on the contrary recognized the fact that taxati
on income was in its nature an excise entitled
be enforced as such unless and until it was co
cluded that to enforce it would amount to a
complishing the result which the requirement
to apportionment of direct taxation was adopt
to prevent, in which case the duty would ari
to disregard form and consider substance alo
and hence subject the tax to the regulation
to apportionment which otherwise as an exc
would not apply to it."

The Government further argues that it was decid
in the *Brushaber* case that an income tax is in its natu
not a direct tax but an excise, and that the sixtee
amendment has removed all possibility of turning
into a direct tax by a consideration of the sources fr
which the income is derived. The brief then says:

"This ruling therefore disposes of the c
tention of the plaintiff in error, because i

> clear that the constitutional provision that no tax or duty shall be laid on articles exported from any State refers to a direct tax upon such articles, and the plaintiff in error's whole claim is that it is entitled to change the income tax from an excise into a direct tax by reason of the source from which the income is derived, and then call that direct tax a tax upon articles exported."

This argument, it seems to us, involves a misapprehension of the plaintiff's contention and some confusion of thought.

We do not deny that the tax in question is in the nature of an excise; nor do we claim a right to change it from an excise to a direct tax by reason of the source from which the taxed income was derived. We claim that it makes no difference whether a tax on exports is direct or indirect, or whether it is imposed on the goods exported, or on the business of exporting, or on the profits derived therefrom; that whatever form it takes it violates the constitutional mandate which provides that exports shall be free.

That the constitutional provision exempting exports refers to indirect as well as to direct taxes, is shown by the opinion of Chief Justice Marshall in *Brown* v. *Maryland*, quoted on page 22 of our principal brief, and by that of Mr. Justice White in the *Pollock* case, quoted on pages 31, 32 and 33, and by the opinion in *Stanton* v. *Baltic Mining Co.*, quoted on page 13.

The various opinions in the *Pollock* case show that the court divided only on the question as to whether the tax levied under the income tax act of 1894 was direct or indirect in so far as it was imposed upon income from real and personal property, and that the court was unanimous in holding that the tax was unconstitutional in so far as it rested upon income from municipal securities for the reason that Congress was without power to impose any tax whatever upon such securities and, therefore, the question as to whether the tax, as applied to them, was direct or indirect, was altogether negligible.

The opinion in the *Stanton* case not only confirms the view as to the extent of the constitutional exemption expressed in the earlier cases, but holds in addition that this exemption is not curtailed by the sixteenth amendment for the reason that such amendment added no new subject to the taxing power of Congress.

We respectfully submit that the judgment appealed from should be reversed.

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November, 1917.

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In the Supreme Court of the United States.

OCTOBER TERM, 1917.

WILLIAM E. PECK AND COMPANY, INCORPORATED, plaintiff in error,
v.
JOHN Z. LOWE, JR., COLLECTOR OF INTERNAL REVENUE, SECOND DISTRICT OF NEW YORK.
No. 324.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF IN BEHALF OF DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

This suit involves the applicability, or rather the nonapplicability, of a clause in the Constitution and is therefore properly here on direct appeal from the District Court of the United States for the Southern District of New York to review a judgment therein rendered in favor of the United States Collector of Internal Revenue. As appears by the complaint, plaintiff in error is a corporation organized and existing under the laws of the State of West Virginia, having its principal place of business in New York City. (R. 2, 16–20.) The corporation was in the year

1914 engaged in buying goods in the United States and selling them at a profit in foreign countries, principally South America and Australia. (R. 20–21, 31–36.)

The defendant, as Collector of Internal Revenue for the Second District of New York, on or about May 25, 1915, acting pursuant to the provisions of section 2 of the act of Congress entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, demanded of the plaintiff in error the sum of $426.10, claimed to be due and payable as income tax for the calendar year ending December 31, 1914. (R. 8, 21.) Thereafter payment of said amount was made to the defendant under protest. (R. 8, 23–26.)

Subsequently plaintiff in error filed in writing with the Commissioner of Internal Revenue an application for a refund and repayment to it of said sum of $426.10, on the ground that section 2 of the Act of October 3, 1913, providing for a tax on incomes of individuals, corporations, etc., in so far as said tax is assessed and levied upon incomes derived from exports, is in violation of clause 5, section 9, Article I, of the Constitution of the United States, which provides that "No tax or duty shall be laid on articles exported from any State." (R. 4, 27-28.) The Commissioner of Internal Revenue rejected said claim for refund, holding that according to the return made by plaintiff in error for the calendar year 1914 the assessment of $426.10 as an income tax was

correct because the income tax provision of said act contemplates that the tax shall "be assessed and paid annually upon the net income arising or accruing *from all sources* during the preceding calendar year."

The answer of the defendant admits the demand made upon and payment by the plaintiff in error, under protest, of said sum of $426.10, but denies each and every the allegations of the complaint in so far as the authority of the defendant to collect said tax is questioned or the rejection of the claim for refund by the Commissioner of Internal Revenue impugned. (R. 7-8.) Paragraph seven of the complaint alleges that the assessment of said tax and the collection thereof was "from income of the plaintiff earned in and obtained by and through exporting merchandise from the United States to foreign countries and said tax * * * was a tax on the proceeds of exportations and as such was in substance and effect a tax on exports and in violation of the Constitution of the United States." (R. 4.)

Plaintiff in error offered in evidence a detailed return of net income for the calendar year ending December 31, 1914 (R. 82–83), wherein it is shown that the company's net income from sales of goods in foreign countries amounted to $30,173.66. This does not include certain items deducted as income received from other sources, aggregating the sum of $12,436.24, which in fact was derived from domestic accounts of the corporation. It is conceded by the record that the assessment of a tax on said sum of

$13,486.24 was legal, and that the claim of the plaintiff in error filed with the Commissioner of Internal Revenue should have been for $891.74, being the tax assessed against the net income derived solely from sales abroad. This inability of the plaintiff itself to make the separation until it was worked out at the trial table shows the practical difficulty attending any assertion that a tax upon income derived from sales made in foreign lands, is in any true sense a tax "on (the) articles exported."

It indisputably appears that the foreign business of the plaintiff in error was not one of direct exportation, but consisted of selling "over there" what had been by it actually purchased here. (R. 35–36.)

In the District Court, at the close of the hearing of evidence and taking of testimony, both litigants asked for a directed verdict. The court granted the motion of the defendant and directed a verdict sustaining the tax, to which ruling of the court plaintiff in error excepted. A motion was made in behalf of plaintiff in error to set aside said verdict for defendant and grant a new trial upon the ground that the verdict was contrary to the evidence and the law, which motion was denied by the court, plaintiff in error reserving an exception to that ruling (R. 39–37).

The opinion of the District Court is succinct and appears on pages 10–12 of the record. The case is reported, *William E. Peck and Company (Inc.) v. Lowe, Collector*, in 284 Fed. 125.

THE STATUTE.

Section 2 of the act of Congress approved October 3, 1913, 38 Stat. 166, 172, provides, in so far as material, as follows:

> G (a). That the normal tax hereinbefore imposed upon individuals likewise shall be levied, assessed, and paid annually upon the entire net income arising or accruing *from all sources* during the preceding calendar year to every corporation, joint stock company or association, and every insurance company, organized in the United States, no matter how created or organized, not including partnerships. [Italics supplied.]

ARGUMENT.

It is admitted that the statute clearly and expressly by its terms covers income derived from export business. The only question, therefore, presented by the record is whether or not the provision of Article I, section 9, clause 5, of the Constitution providing that "No tax or duty shall be laid on articles exported from any State" makes this general provision of the act laying a tax upon incomes derived from all sources unconstitutional in so far as it relates to income derived from an export business.

I.

A general tax laid upon all persons with respect to their income does not become a tax upon "articles exported" because the income is derived from an export business.

Obviously the Income Tax Law did not affect, either directly or indirectly, or place any burden upon or interference with, the "articles exported" by the plaintiff in error. The assessment of the tax was not made until *after* the filing of the return, which showed the entire gross and net income for the preceding calendar year. The amount of the tax was dependent upon the amount of the net income *received* during the year and was measured by a fund which had become the property of the corporation—partly the *result* of the exportation of goods—mingled with its other property and which had become incorporated into the general mass of property in this country and subject to taxation in the same manner as other property possessed by its citizens. As is pointed out by the court below (R. 12), income or profit "presupposes a successfully completed transport." It is no part of the act of exportation, but is merely the result thereof, and, therefore, as the court states, "profits on income from exports should be taxable because subsequent to the act of export."

In *Cornell v. Coyne*, 192 U. S. 418, 426, this court had occasion to consider an act of Congress, approved June 6, 1896, imposing a tax upon the manufacture and exportation of filled cheese. The plaintiff in error had entered into contracts for the manufacture

and export of large quantities of filled cheese, and pursuant to such contracts had manufactured and was about to export the product when the defendant in error, as collector of internal revenue, compelled the purchase and affixing of revenue stamps to the exported packages in accordance with said act of Congress. Purchase of the revenue stamps was made under protest and an application for a refund of the amount so paid was later filed with the Commissioner of Internal Revenue, as authorized by section 3226, Revised Statutes, but said application was rejected. Thereupon an action was commenced in the Circuit Court of the United States for the Northern District of Illinois, and the declaration alleged that the provisions of the act of Congress aforesaid, were repugnant to the provisions of Article I, section 9, clause 5, of the Constitution. A demurrer to the declaration was sustained and the case came here on a writ of error.

It was decided that the tax imposed by the act was not a tax on exports and was therefore constitutional and valid. The opinion says (p. 427):

> While that which is asked in this case is the return of a manufacturing tax there is nothing in the constitutional provision to distinguish between manufacturing and other taxes, and if the plaintiff's contention be sustained as to a manufacturing tax it would follow that the government was bound to refund all prior taxes imposed on articles exported. A farmer may raise cattle with

> the purpose of exportation, and in fact export them. Can it be that he is entitled to a return of all property taxes which have been cast upon those cattle? *The true construction of the constitutional provision is that no burden by way of tax or duty can be cast upon the exportation of articles,* and does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated. *The exemption attaches to the export* and not to the article before its exportation. Such has been the ruling of this court. [Italics supplied.]

It is submitted that the present case can not be distinguished from *Cornell* v. *Coyne*. If a tax in the form of revenue stamps can be imposed upon articles manufactured for export without becoming a violation of the constitutional prohibition, *a fortiori*, a tax upon the net income of a domestic corporation derived from the sale of exported articles in foreign countries is undoubtedly constitutional and valid.

In *Brown* v. *Houston*, 114 U. S. 622, 629, this court said:

> A duty on exports must either be a duty levied on goods as a condition, or by reason of their exportation, or, at least, a direct tax or duty on goods which are intended for exportation. Whether the last would be a duty on exports, it is not necessary to determine. But certainly, where a general tax is laid on all property alike, it cannot be construed as a duty on exports when falling

upon goods not then intended for exportation, though they should happen to be exported afterwards.

In *Turpin* v. *Burgess*, 117 U. S. 504, which presented the same constitutional question as the case of *Pace* v. *Burgess*, 92 U. S. 372, this court sustained an act of Congress requiring the affixing of an exportation stamp to packages of tobacco intended for export. The court, at page 506 of the opinion, said:

> We have lately decided, in *Coe* v. *Errol*, 116 U. S. 517, that goods intended for exportation to another State are liable to taxation as part of the general mass of property of the State of their origin until actually started in course of transportation to the State of their destination, or delivered to a common carrier for that purpose, provided they are taxed in the usual way in which such property is taxed, and *not taxed by reason or because of such exportation*, or intended exportation, and that the carrying of them to and depositing them at a depot for the purpose of transportation is no part of that transportation. Now the constitutional prohibition against taxing exports is substantially the same when directed to the United States as when directed to a State. * * * The prohibition in both cases has reference to the imposition of duties *on goods by reason or because of their exportation or intended exportation, or whilst they are being exported*. That would be laying a tax or duty on exports, or on articles exported, within the meaning of the Constitution. But a general

> tax, laid on all property alike, and not levied on goods in course of exportation, nor because of their intended exportation, is not within the constitutional prohibition. [Italics supplied.]

In view of the foregoing, the decision of this court in the earlier case of *State Tax on Railway Gross Receipts*, 15 Wall. 284, 292, 296, is enlightening, and although considered and questioned in *Philadelphia, &c. Steamship Co.* v. *Pennsylvania*, 122 U. S. 326, 344, the analogy between that case and the present one holds good. The court said:

> If then a tax upon the gross receipts of a railroad, or a canal company, derived in part from the carriage of goods from one State to another is to be regarded as a tax upon interstate transportation, the question before us is already decided. The answer which must be given to it depends upon the prior question, whether a tax upon gross receipts of a transportation company is a tax upon commerce, so far as that commerce consists in moving goods or passengers across State lines. No doubt every tax upon personal property, or upon occupations, business, or franchises, affects more or less the subjects, and the operations of commerce. Yet it is not everything that affects commerce that amounts to a regulation of it, within the meaning of the Constitution. * * * It is not denied that *net earnings* of such corporations are taxable by State authority *without any inquiry after their sources*, and it is difficult to state any well-founded dis-

tinction between the lawfulness of a tax upon them and that of a tax upon gross receipts. [Italics supplied.]

And in *Philadelphia, &c., Steamship Co.* v. *Pennsylvania, supra*, although holding that the tax imposed by the statute of Pennsylvania was unconstitutional because it was a regulation of and interference with interstate and foreign commerce and, therefore, under the rule established by *Cooley* v. *The Port Wardens*, 12 How. 299, exclusively subject to the legislation of Congress, the opinion proceeds (page 344):

> There is another point, however, which may properly deserve some attention. Can the tax in this case be regarded as an income tax? and, if it can, does that make any difference as to its constitutionality? We do not think that it can properly be regarded as an income tax. It is not a general tax on the incomes of all the inhabitants of the state; but a special tax on transportation companies. Conceding, however, that an income tax may be imposed on certain classes of the community, distinguished by the character of their occupations; this is not an income tax on the class to which it refers, but a tax on their receipts for transportation only. * * * It is unnecessary, therefore, to discuss the question which would arise if the tax were properly a tax on income. It is clearly not such, but a tax on transportation only.
>
> The corporate franchises, the property, the business, *the income* of corporations created

> by a state may undoubtedly be taxed by the state; but in imposing such taxes care should be taken not to interfere with or hamper, directly or by indirection, interstate or foreign commerce, or any other matter exclusively within the jurisdiction of the Federal government. * * * [Italics supplied.]

The plaintiff in error relies upon certain cases where essential instrumentalities of commerce have been taxed, and it has been held by this court that the tax becomes thereby a tax upon the commerce itself. The cases mostly relied upon are *Fairbank* v. *United States*, 181 U. S. 283, *United States* v. *Hvoslef*, 237 U. S. 1, and *Thames and Mersey M. Insurance Co.* v. *United States*, 237 U. S. 19. These cases, however, are not in any way inconsistent with the decision of this court in *Cornell* v. *Coyne, supra*, and do not in the least indicate, much less decide, that a tax measured by income, levied under the general power given to Congress, can be held to be a tax upon exports because the income happens to be derived therefrom. It is one thing to say that a tax upon a bill of lading or upon a marine insurance policy is in its ultimate effect a tax upon the articles represented by those papers, and an entirely different thing to say that the tax upon a person in respect to his income is a tax upon exports because a portion of that income happens to be derived from an export business. The tax is against indicated classes of citizens and residents of the United States personally. They are charged (taxed) with respect to incomes received by them. The

statement that the tax is upon the income does not create an obligation *in rem* against it or the property or source from which it came. When we say that the tax is an income tax, or is on income, that is only another way of saying that the owner of the income is subject to be taxed with respect to or in proportion to—*i. e.*, with regard and reference to—the amount or size of his income, without any inquiry with respect to whence that income emanated. *Brady et al.* v. *Anderson*, 240 Fed. 665.

II.

The case is completely governed by the decisions of this court in the corporation tax and income tax cases.

In *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 165, this court held as follows:

> It is therefore well settled by the decisions of this court that when the sovereign authority has exercised the right to tax a legitimate subject of taxation as an exercise of a franchise or privilege, it is no objection that a measure of taxation is found in the income produced in part from property which of itself considered is non-taxable. Applying that doctrine to this case, the measure of taxation being the income of the corporation from all sources, as that is but the measure of a privilege tax within the lawful authority of Congress to impose, it is no valid objection that this measure includes, in part at least, property which as such could not be directly taxed. See in this connection *Maine* v. *Grand Trunk Ry. Co.*, 142

U. S. 217, as interpreted in *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Texas*, 210 U. S. 217, 226.

It is therefore entirely clear that if the case at bar had arisen under the provisions of the Corporation Tax Act, the claim made by the plaintiff in error would be without foundation. It is, however, equally clear that a general income tax is an excise tax laid upon persons or corporations with respect to their income; that is, a person or corporation is selected out from the mass of the community by reason of the income possessed by him or it, and his or its duty to contribute to the public revenues is measured by the income received by him or it from all sources. The only difference, therefore, between the position of a corporation under the Corporation Tax Act and its position under the Income Tax Act is that the measure and standard of its liability is now its income directly, whereas before, the standard was the privilege of doing business as an artificial entity with the advantages inherent in a corporate organization, which in its turn was measured by income. Under the present income tax law one step in the process has been omitted, but the principle is the same, and the rule laid down in the case of *Flint* v. *Stone Tracy Company* is equally applicable to the income tax.

This is brought out clearly by the decisions of this court in *Brushaber* v. *Union Pacific Railroad Co.*, 240 U. S. 1, and *Stanton* v. *Baltic Mining Co.*, 240 U. S. 103. In the former case it was pointed out that the all-embracing power of taxation conferred

upon Congress by the Constitution included two great classes, one indirect taxes or excises, and the other direct taxes, and that the only limitation upon this power was that of uniformity in regard to indirect, and that of apportionment with regard to direct taxes. It was held that an income tax in its nature is an excise; that is, it is a tax upon a person measured by his income, but that prior to the adoption of the Sixteenth Amendment an income tax might be said to do indirectly what it was prohibited to do directly and in that way have the effect of a direct tax in such sort as to bring it within the category of taxes required to be apportioned. That is, where the income was derived directly from real estate, the tax might be said to have the effect of being a direct tax upon real estate, and as such would be subject to the limitation of apportionment. It was further held that the effect of the Sixteenth Amendment was not to change the nature of this tax or to take it out of the class of excises to which it belonged, but was merely to make it impossible by any sort of reasoning thereafter to treat it as a direct tax because of the sources from which the income was derived. The court on pages 17 and 18, after quoting the Sixteenth Amendment, said as follows:

> It is clear on the face of this text that it does not purport to confer power to levy income taxes in a generic sense—an authority already possessed and never questioned—or to limit and distinguish between one kind of

income taxes and another, but that the whole purpose of the Amendment was to relieve all income taxes when imposed from apportionment from a consideration of the source whence the income was derived.

Again on pages 18 and 19 the court said:

> * * * that the contention that the Amendment treats a tax on income as a direct tax although it is relieved from apportionment and is necessarily therefore not subject to the rule of uniformity as such rule only applies to taxes which are not direct, thus destroying the two great classifications which have been recognized and enforced from the beginning, is also wholly without foundation since the command of the Amendment that all income taxes shall not be subject to apportionment by a consideration of the sources from which the taxed income may be derived, forbids the application to such taxes of the rule applied in the *Pollock Case* by which alone such taxes were removed from the great class of excises, duties and imposts subject to the rule of uniformity and were placed under the other or direct class. This must be unless it can be said that although the Constitution as a result of the Amendment in express terms excludes the criterion of source of income, that criterion yet remains for the purpose of destroying the classifications of the Constitution *by taking an excise out of the class to which it belongs and transferring it to a class in which it cannot be placed consistently with the requirements of the Constitution*. [Italics supplied.]

Here, then, is a clear holding that an income tax is in its nature not a direct tax but an excise, and that the Sixteenth Amendment has removed all possibility of turning it into a direct tax by a consideration of the sources from which the income is derived. This ruling therefore disposes of the contention of the plaintiff in error, because it is clear that the constitutional provision that no tax or duty shall be laid on articles exported from any State refers to a direct tax upon such articles, and the plaintiff in error's whole claim is that it is entitled to change the income tax from an excise into a direct tax by reason of the source from which the income is derived, and then call that direct tax a tax upon articles exported.

This is brought out even more clearly, if it be possible, by the decision in *Stanton* v. *Baltic Mining Company, supra*. In that case the claim of the mining company was that as to persons or corporations engaged in mining, the Income Tax Act, since it did not provide for a sufficient allowance for depreciation, was in effect a tax upon the capital of the mining company and not upon its income. This court held that this claim was entirely unfounded, and used the following language (pp. 113, 114):

> It moreover rests upon the wholly fallacious assumption that looked at from the point of view of substance a tax on the product of a mine is necessarily in its essence and nature in every case a direct tax on property because of its ownership unless adequate allowance be made for the exhaustion of the ore body to result from working the mine. We say wholly

fallacious assumption because independently of the effect of the operation of the Sixteenth Amendment it was settled in *Stratton's Independence* v. *Howbert*, 231 U. S. 399, that such a tax is not a tax upon property as such because of its ownership, but a true excise levied on the results of the business of carrying on mining operations (pp. 413 *et seq.*).

Here again is a clear holding that the manner in which the income tax operates, or the sources from which the income is derived, can not change the nature of the tax from an excise into a direct tax, and it is especially to be noted that the authority relied upon is a case arising under the Corporation Tax Act. In other words, this court saw no difference, so far as the nature of the tax was concerned, between an excise upon a corporation with respect to its doing business and measured by income, and a tax upon the corporation with respect merely to its income alone.

That this is a correct interpretation of this court's decision in the Brushaber and Stanton cases is brought out by the opinion of the Court of Appeals of the Second Circuit in *Brady et al.* v. *Anderson*, 240 Fed. 665 (*writ of certiorari denied*, 244 U. S. 654).

In that case, the Court of Appeals said (p. 667):

> The plaintiffs argue that as Brady, having died July 22d, was neither a citizen nor a resident of the United States October 3, 1913, at the time the act was passed, its language does not authorize collection of any tax upon income received by him. On the other hand, the government says that as the tax is upon

the property, it makes no difference whether Brady was living or dead at that time.

In our opinion the tax is against the citizens and residents of the United States personally. They are chargeable in respect to income received by them. The statement that the tax is upon this income does not create an obligation *in rem*. It is only a way of saying that the owner is taxable with reference to the income. Taxable persons are spoken of throughout the act. * * *

The general principles governing the matter necessarily lead to this same conclusion. As stated above, the basis of an income tax is the duty owed by citizens to contribute to the public support in proportion to the incomes received by them, and that duty can not be limited or affected by reason of the source from which the income is derived. It is the receipt of the income which creates the duty, and not the particular business in which the taxpayer is engaged, nor the sources from which his income is derived.

The argument of the plaintiff in error logically and naturally leads to an absurdity. An income tax upon an exporter is no more a burden upon the export of articles from this country than is a tax upon his warehouse, which lends itself to his business, or upon his residence, which was purchased with profits on shipments abroad, or upon his personal property generally, which represents the avails of his enterprises. In fact, an income tax probably disturbs the export business less than several other taxes. It must follow, therefore, if the argument of the plaintiff in error

be correct, that persons engaged in the export business are immune from all taxes, and occupy a favored position with relation to all other classes of the community.

CONCLUSION.

The holding of the District Court was manifestly correct. True, it rested the conclusion on the somewhat narrow foundation that the unhampered exporting of articles having resulted in net profits which constituted the income, consequently the taxation of the income was permissible without violence to the Constitution.

The court might very well have advanced to and occupied the stronger, the unassailable, position to the effect that the tax is in reality one imposed upon the person, natural or artificial, measured with respect to that person's income or degree of prosperity, regardless of the source whence came that income or what dealings caused the ascertained ability to bear the designated portion of governmental support.

We respectfully submit that there is no error in the record, and that the judgment of the court below should be affirmed.

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